(1) Supreme Court, U.S.

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NO.-_____

IN THE

Supreme Court of the United States

KATHRYN HELLWIG,
Petitioner

v.

PENNSYLVANIA,
Respondent

Petition for a Writ of Certiorari to the Pennsylvania Superior Court

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Fourth Amendment to the Constitution of the United States guarantee a purported victim of crime freedom from a warrantless search of his or her property absent exigent circumstances?

PARTIES TO THE PROCEEDING

Petitioners (defendant and appellant below):

The Petitioner is Kathryn Hellwig.

Represented by:

Patricia M. Hoban, Esquire
4322 Main Street
P.O. Box 55435
Philadelphia, PA 19127

Respondent (appellee below):

The Respondent is the Commonwealth of Pennsylvania.

Represented by:

Diane E. Gibbons, Esquire
District Attorney
Office of the District Attorney
Bucks County Courthouse
Doylestown, PA 18901

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PRELIMINARY STATEMENT

Petitioner respectfully requests that Your Honorable Court issue a Writ of Certiorari to the Pennsylvania Superior Court in order to clarify the circumstances in which a warrantless search of a person's belonging may be made when that person purports to be a victim of a crime.

OPINIONS BELOW

The memorandum opinion of the Pennsylvania Superior Court is not reported. A complete copy of the opinion is contained in the Appendix at A1-A46. The opinion of the Court of Common Pleas of Bucks County, 10th Judicial District of Pennsylvania, is not reported. A complete copy of that opinion is contained in the Appendix at A47-51.

JURISDICTION

Petitioner invokes the jurisdiction of Your Honorable Court pursuant to 28 U.S.C. § 1257 (a) in that the Petitioner is claiming a right, immunity or privilege under the Constitution of the United States.

The Petitioner was convicted of two misdemeanor counts in the Court of Common Pleas of Bucks County on January 14, 1999 and a timely appeal to the Pennsylvania Superior Court was perfected and the judgment of sentence was affirmed on November 14, 1999. Reconsideration was sought, and an Order denying rehearing was entered on January 21, 2000. A timely Petition for Allowance of Appeal was filed in the Pennsylvania Supreme Court and an Order denying discretionary review was entered by that Court on July 17, 2000.

STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Petitioner was convicted, sentenced to a lengthy prison term and immediately incarcerated[1] on January 14, 1999 on two (2) non-violent misdemeanor counts stemming from her report to Warminster Township police authorities that she was abducted by unknown assailants and thereafter shot in her right thigh. In the first count, the Petitioner was

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[1]This case has had a significant post trial history. The Trial Court directed that the Petitioner be taken into immediate custody following her conviction without any consideration for release on bail pending the appeal even though Pa.R.Crim.P. No. 521 (B) (1) requires the Court to continue bail throughout the appellate process under the circumstances of this case. Petitioner thereafter filed an emergency petition with the Pennsylvania Superior Court to compel the Trial Court to conduct a hearing to determine whether the Petitioner should be released from custody. The Petitioner's application was granted, and the Trial Court thereafter restored her freedom. Similarly, the Trial Court conducted a hearing on September 20, 2000 to determine whether the Petitioner should be again incarcerated due to the denial of review by the Pennsylvania Supreme Court. In violation of the same procedural rule and the appellate decision in the case of *Commonwealth v. Fuchs,* 372 Pa.Super. 499, 539 A.2d 1307 (1988) *app. denied* 521 Pa. 610, 557 A.2d 341, the Trial Court determined that the Petitioner would again be jailed unless the instant petition was filed on or before October 1, 2000. Thus, the Trial Court apparently disregarded mandatory case law as well as the time limits promulgated by Your Honorable Court in Rule 13.

charged with Unsworn Falsification to Authorities, 18 Pa.C.S. § 4904, and in the second count, the Petitioner was charged with False Reports to Law Enforcement Authorities, 18 Pa.C.S. § 4906. The underpinnings of both charges relate to the Commonwealth's belief that the Petitioner was not, in fact, abducted and that the entire episode was staged by the Petitioner.

The salient facts underlying the case at bar are not particularly lengthy nor are they complex. On April 19, 1998, the Petitioner contacted her friend, Philadelphia Police Sergeant Anthony Ginaldi, and reported to him that she had been abducted and shot in the leg. Sergeant Ginaldi responded to the Petitioner's distress call at the Yum Yum Donut Shop located on County Line Road in Warminster Township. He immediately hailed a passing Hatboro police patrol car and requested that his Philadelphia police radio dispatcher contact the police department having jurisdiction over the area.

In accordance with Sergeant Ginaldi's request, several Warminster Township police officers responded to the scene. Police Officer Michael Davis arrived approximately four minutes after his first notification of the incident. Prior to his arrival, a passing Emergency Medical Technician rendered rudimentary medical assistance to the Petitioner by attempting to stem the flow of blood from the Petitioner's wound. (Vol. I, p. 14) Ambulance personnel arrived shortly thereafter and Officer Davis began to question the Petitioner concerning the matter even before the ambulance crew was permitted to administer aid. (Vol. I, p. 29.) Even though the Petitioner was in dire need of immediate hospital care to tend to her wound, Officer Davis continued to question the Petitioner at the scene for at least five to ten minutes (Vol. I, p. 23.) According to Officer Davis, the delay in transporting the Petitioner to Abington Hospital resulted from a "miscommunication" in that he believed that the ambulance

crew was waiting until Officer Davis' interrogation of the Petitioner was completed. (Vol. I, p. 31).[2] According to Officer Davis, the ambulance crew eventually removed the Petitioner from her vehicle and transported her to Abington Hospital approximately fifteen minutes after Officer Davis arrived at the scene. (Vol. I, p. 32).[3] In the process of doing so, the Petitioner was placed on a secured gurney in accordance with standard procedures. (Vol. I, p.54). In actuality, the ambulance crew arrived at 2:10 a.m. and did not place the Petitioner into the ambulance until 2:38 a.m. during which time various members of the Warminster Police Department continually interrogated the Petitioner despite her obvious need for immediate medical attention. (Vol. II, p. 9)

Upon removal by the ambulance crew, Warminster Police Sergeant Mosiniak directed that she be accompanied in the ambulance by Warminster police officer Carol Battistini. (Vol. I, p. 42). In turn, Officer Davis followed the ambulance in his patrol vehicle. (Vol I, p. 33.) Like Officer Davis, Officer Battistini questioned the Petitioner concerning the events during the fifteen minute trek to Abington Hospital (Vol. I, p. 43), while the crew was removing the Petitioner's clothing and attempting to administer first aid. (Vol. I, p. 56).

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[2]Pam Cantrambone, one of the responding ambulance volunteers, testified that the emergency medical technicians were initially unable to conduct an assessment of the Petitioner's physical condition due to the interrogation of the Petitioner by the police. (Vol. II, p. 11). Ms Cantrambone was eventually able to speak to the Petitioner only after the passage of 20 minutes. (Vol. II, p. 11).

[3]According to Officer Battistini's recollection, however, the length of time from the Warminster Police Department response to the removal of the Petitioner from the scene was approximately 30 minutes. (Vol. I, p. 53.) Again, Officer Davis' testimony is inconsistent with that of Ms. Cantarambone.

Sergeant Mosiniak also dispatched Warminster Police Officer Detective Charles Wilson to Abington Hospital. In addition to the prior interviews by Officers Davis and Battistini, Detective Wilson also interrogated the Petitioner for approximately 20 to 30 minutes while she was being treated in the emergency room.

Throughout the entire time that the Petitioner was at Abington Hospital, she was accompanied by Officers Battistini and Davis. During the course of her examination by medical personnel, Officer Battistini even took a multitude of photographs. (Vol. I, p. 48). Just prior to surgical removal of the round which was lodged in the Petitioner's leg, the Petitioner was sedated. (Vol I., p. 48). Though she was under the influence of medication, Sergeant Mosiniak, along with Philadelphia Detective Durso, continued the interrogation of the Petitioner after she was released from surgery. (Vol. I, p. 103). Approximately one hour after surgery, Officer Battistini resumed her interrogation of the Petitioner concerning the abduction. (Vol. I, p. 49). Again, Officer Battistini and other detectives questioned the Petitioner after she was taken to a regular hospital room for recovery approximately 45 minutes after surgery. (Vol. I, p. 59). Officer Battistini stayed at the hospital for an additional hour. (Vol. I, p. 59).

Throughout the events of the day of the incident, according to the various police officers from the Warminster Police Department, the Petitioner indicated that she had been abducted and shot by a masked assailant driving a blue Chevy Blazer. (Vol. II, p. 94). At no time did the police officers advise the Petitioner with regard to her Miranda rights. See generally Trial Court Opinion.

Following her discharge from the hospital, the Petitioner was again questioned by the Warminster Township police authorities on two separate occasions. On May 1,

1998, Detective Mosiniak questioned the Petitioner at length at his office in the Warminster Police Station. According to his testimony during the litigation of the Petitioner's Motion to Suppress Evidence, the purposes thereof "was . . to go over the facts again. . . and also to go over some inconsistencies" in the previous information supplied to the police by the Petitioner. (Vol. I, p. 130). At the request of Detective Mosiniak, the Petitioner authored a written account of the incident, and after reviewing the statement, Detective Mosiniak determined that "[t]here was a lot of information in there that was inconsistent with some facts that I had already found out. And the purpose of the oral interview was to ask questions about what I had read." (Vol. I, p. 135).[4]

On May 6, 1997, the Petitioner returned to the Warminster Police Station to give a second written account of the matter. (Vol. I, p. 136).[5] Because of the apparent inconsistencies in the original oral statement and the two subsequent written statements, the Petitioner was charged.

The Pretrial Motions - Motion to Suppress

After her Preliminary Hearing, the Petitioner filed an Omnibus Motion for Pretrial Relief wherein she averred that:

(1) all of the evidence against the Petitioner should have been suppressed in light of the unreasonable warrantless search and seizure of the evidence after the Petitioner had become a suspect of a crime;

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[4]A substantially verbatim account of the May 1, 1998 statement is contained in the Trial Court's Opinion at pp. 4-13 (Vol. III, pp. 30-43).

[5]The Petitioner's May 6, 1998 statement is included in the Trial Court Opinion at pp. 13-19.

(2) all of the statements given by the Petitioner should have been suppressed because the police officers never advised the Petitioner of her Miranda rights;

Motion to Suppress Statements

Prior to jury selection, the Trial Court convened to determine the merits of the Petitioner's Motion to Suppress at which time Officers Davis, Battistini, Wilson, Selisker, McAteer, Armitage and Detectives Mosiniak and Durso testified on behalf of the Commonwealth. Essentially, all of the Commonwealth witnesses stated that the Petitioner was initially viewed as a victim of crime and that their original inquiries were directed toward obtaining information necessary to identify and apprehend the assailant or assailants. The Commonwealth's witnesses also stated, albeit in conclusory language, that the Petitioner was not advised of her Miranda rights since she was not "in custody" and that the Petitioner exhibited a calm demeanor throughout the entire ordeal of six police interrogations while undergoing sedation and surgery.

In contrast to the testimony of the Commonwealth's witnesses, Philadelphia Police Sergeant Anthony D. Ginaldi testified on behalf of the Petitioner during the Motion to Suppress. Sergeant Ginaldi stated that he was initially notified of the incident by the Petitioner at approximately 1:48 a.m. on April 19, 1998 at which time the Petitioner was hysterical, and moaning. (Vol. II, p. 39). Sergeant Ginaldi arrived at the Yum Yum Donut Shop at approximately 2:00 a.m. and he observed that the Petitioner was in substantial pain. (Vol. II, p. 40).

After contacting police authorities in Philadelphia, Warminster Officer Davis was the first local police authority to arrive at the scene. (Vol. II, p. 41). Sergeant Ginaldi observed the manner in which Officer Davis conducted his

interrogation of the Petitioner:

> "He started out in a very agitated tone of voice. He was firing off questions at her. And the more he fired off at her, she tried to answer the questions, he would ask another question, he became louder and louder and louder.

(Vol. II, p. 42). Ignoring a responding police officer's first obligation to look after the medical attention of a shooting victim, Sergeant Ginaldi testified that Officer Davis screamed at the Petitioner "You're a liar, you're a liar, don't lie to me, this didn't happen that way." (Vol. II, p. 43).

Importantly, the Petitioner attempted to introduce the expert testimony of Mr. Frank Friel, a well recognized expert in police procedures and custodial interrogation techniques. (Vol. I, p. 8). Had he been permitted to testify during the Motion to Suppress, Mr. Friel would have testified that police officers are trained "that when the focus of an investigation into a criminal matter begins to center on an individual, and that individual is exposed to criminal liability, officers must warn the suspect of their rights." The Court, however, granted the Commonwealth's Motion in Limine and precluded Mr. Friel's testimony.

According to the Opinion of the Trial Court, Mr. Friel's testimony was simply not the type of expert aid "envisioned and encompassed by the law."

The end result of the litigation concerning the failure of the police officials to warn the Petitioner of her Miranda rights was the Trial Court's decision to accept the Commonwealth's testimony and the Court's finding that the statements attributed to the Petitioner were voluntarily given in a non-custodial atmosphere.

Motion to Suppress Evidence

In addition to the Petitioner's challenge to the Commonwealth's case for Miranda violations, the Petitioner also sought suppression of all of the physical evidence since the Commonwealth's entire case stemmed initially from their warrantless seizure and examination of the Petitioner's personal effects shortly after having been summoned to the Yum Yum Donut Shop. In brief, the Petitioner argued that the seizure of the Petitioner's personal items after she had been subjected to Officer Davis' abusive interrogation under the guise of an "inventory" search was actually undertaken as an investigatory inquiry into the truth of the Petitioner's statements.

During the suppression hearing, Warminster Police Officer Selisker testified as follows:

Q Inside the vehicle were there any items of her personal property?

A Yes.

Q Specifically was there a pocketbook or larger purse as distinguished from a change purse inside the vehicle?

A Yes, there was.

Q Did you take that item into custody?

A Yes, I did.

Q For what purpose?

A Mainly for safekeeping and for personal

effects which may be needed later.

Q Did you know at the time what items would be or would not be of evidentiary value in terms of this shooting allegation?

A No, we did not.

(Vol. I, pp. 87-88). Nevertheless, not only were the items inventoried[6] at which time the police officers listed the contents of the Petitioner's purse (Vol. I, p. 90), but police investigators actively sought the contents of the pocketbook for their evidentiary value against the Petitioner, including a MAC receipt, cash, pager, change purse, cellular telephone and a notebook all of which were employed in the case against the Petitioner (Vol. 11, pp. 164-168). The Court, however, concluded that all of the evidence was lawfully obtained either as an inventory or as "evidence of a crime." Trial Court Opinion at p.36.

Trial

During the course of the trial, Petitioner attempted to introduce the expert testimony of Mr. Frank Friel to establish that the investigation launched by the Warminster and Philadelphia Police Departments into the abduction and shooting of Petitioner was wholly inadequate. More specifically Mr. Friel would have testified that the investigating officers failed to utilize resources available to them to eliminate prospective suspects.

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[6]While the Commonwealth maintains that the search of the Petitioner's pocketbook was proper as an inventory of her personal items, Sergeant Mosiniak testified conversely. He directed the seizure of the pocketbook along with its contents since "[e]verything in that vehicle to [him] was evidence." (Vol. I, p. 101).

In particular, less than twenty four hours after the abduction, the Philadelphia Police Department located a Blue Chevy Blazer matching the description of the "get away" vehicle and owned by a person identified as Amelikar Rivera. Mr. Friel would have testified that the investigating officers should have examined the vehicle to determine if it was operable and could have been used in the abduction. Mr. Friel would have further testified that the investigators should have interviewed Mr. Amelikar Rivera to determine if he was related to Javier Rivera, the live in boyfriend / spouse of a member of the family implicated in the abduction. The officers should have also inquired into the relationship between Amelikar Rivera and Javier Rivera, who lived three doors away from Amelikar in the same city neighborhood. More importantly, Mr. Friel would have testified that the investigating officers should have checked area hospitals for other gunshot victims, check the pedestrian and vehicle stop indexes for Philadelphia and local police jurisdictions, follow through on street information, interview friends and cellmates of Carmello Camacho, the father of Petitioner's six (6) year old daughter.[7]

In summary, Mr. Friel would have testified that the failure of the police departments to conduct an adequate investigation into the abduction went to the integrity of the investigation and the failure of the police officers to believe Petitioner's report at the onset of the investigation.

During the course of the trial, the Petitioner also attempted to introduce the expert testimony of the Petitioner's treating psychotherapist, Lorrie Morrell. Ms. Morrell would have testified that the Petitioner is the victim of post traumatic stress disorder, and that her mental condition impairs the

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[7] Carmello Camacho is currently incarcerated at Gratersford State Correctional Institute and had previously advised his sisters to follow Petitioner and to kidnap his child.

Petitioner's ability to recall matters correctly and may result in amnesia for an important aspect of the underlying traumatic events. The Trial Court, however, refused to allow Ms. Morrell to testify for two reasons. First, the Court concluded that Ms. Morrell could not express an opinion on the Petitioner's mental conditions since Ms. Morrell was not the person who made the initial diagnosis. Secondly, the Trial Court concluded that the testimony was impermissible since the testimony might bolster the credibility of the Petitioner - who did not testify - and lend credence to the belief that the Petitioner was actually the victim of a crime. As such, the Trial Court determined that Ms. Morrell's proffered testimony would invade the province of the fact finders to determine the ultimate questions. See Trial Opinion at p. 38.

Following several days of testimony, the jury determined that the Petitioner was guilty and she was immediately sentenced to concurrent terms of 90 days to 23 months.

REASONS FOR GRANTING THE PETITION

A. THE RECENT UNITED STATES SUPREME COURT DECISION IN THE CASE OF *Flippo v. West Virginia* MANDATES REVERSAL OF THE DENIAL OF THE PETITIONER'S MOTION TO SUPPRESS PHYSICAL EVIDENCE

First and foremost, the focus of the police investigation on the Petitioner at such an early stage after the initial report of the Petitioner's abduction requires the suppression of the personal items seized by the police, since the actions of the police far exceed the permissible limits for

a legitimate inventory of the belongings. Because the discovery of virtually all of the physical evidence employed by the Commonwealth in convicting the Petitioner resulted from their initial illegal actions, all of the evidence should have been suppressed. Accordingly, the case at bar presents an opportunity for Your Honorable Court to instruct the Courts of this Commonwealth concerning the necessity of obtaining a warrant to search a victim's personal belongings when the victim is actually the target of the investigation.

Prior to jury selection, the Trial Court convened to determine the merits of the Petitioner's Motion to Suppress at which time Officers Davis, Battistini, Wilson, Selisker, McAteer, Armitage and Detectives Mosiniak and Durso testified on behalf of the Commonwealth. Essentially, all of the Commonwealth witnesses stated that the Petitioner was initially viewed as a victim of crime and that their original inquiries were directed toward obtaining information necessary to identify and apprehend the assailant or assailants. The Commonwealth's witnesses also stated, albeit in conclusory language, that the Petitioner was not advised of her *Miranda* rights since she was not "in custody" and that the Petitioner exhibited a calm demeanor throughout the entire ordeal of six police interrogations while undergoing sedation and surgery.

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first local police authority to arrive at the scene. (Vol. II, p. 41). Sergeant Ginaldi observed the manner in which Officer Davis conducted his interrogation of the Petitioner:

> "He started out in a very agitated tone of voice. He was firing off questions at her. And the more he fired off at her, she tried to answer the questions, he would ask another question, he became louder and louder and louder.

(Vol. II, p. 42). Ignoring a responding police officer's first obligation to look after the medical attention of a shooting victim, Sergeant Ginaldi testified that Officer Davis screamed at the Petitioner "You're a liar, you're a liar, don't lie to me, this didn't happen that way." (Vol. II, p. 43).

Importantly, the Petitioner attempted to introduce the expert testimony of Mr. Frank Friel, a well recognized expert in police procedures and custodial interrogation techniques. (Vol. I, p. 8). Had he been permitted to testify during the Motion to Suppress, Mr. Friel would have testified that police officers are trained "that when the focus of an investigation into a criminal matter begins to center on an individual, and that individual is exposed to criminal liability, officers must warn the suspect of their rights." The Court, however, granted the Commonwealth's Motion in Limine and precluded Mr. Friel's testimony.

The Petitioner sought suppression of all of the physical evidence since the Commonwealth's entire case stemmed initially from their warrantless seizure and examination of the Petitioner's personal effects shortly after having been summoned to the Yum Yum Donut Shop. In brief, the Petitioner argued that the seizure of the Petitioner's personal items after she had been subjected to Officer Davis' abusive interrogation under the guise of an "inventory" search was actually undertaken as an investigatory inquiry into the

truth of the Petitioner's statements. While the Commonwealth maintains that the search of the Petitioner's pocketbook was proper as an inventory of her personal items, Sergeant Mosiniak testified conversely. He directed the seizure of the pocketbook along with its contents since "[e]verything in that vehicle to [him] was evidence." (Vol. I, p. 101). Nevertheless, not only were the items inventoried at which time the police officers listed the contents of the Petitioner's purse (Vol. I, p. 90), but police investigators actively sought the contents of the pocketbook for their evidentiary value against the Petitioner, including a MAC receipt, cash, pager, change purse, cellular telephone and a notebook all of which were employed as evidence in the case against the Petitioner (Vol. 11, pp. 164-168). The Trial Court held, and Your Honorable Court agreed, that all of the evidence was lawfully obtained either as an inventory or as "evidence of a crime." Trial Court Opinion at p.36.

In the recent United States Supreme Court decision of *Flippo v. West Virginia*, __ U.S. ___, 120 S.Ct. 7, 68 USLW 3260 (October 18, 1999), the Court held that the Fourth Amendment to the Constitution of the United States requires that police officers, responding to a report of a crime, are nevertheless required to obtain a warrant in order to conduct an evidentiary search of the crime scene. The decision in *Flippo* is particularly significant to the case at bar because of the similarity of the facts.

In *Flippo*, police officers were summoned by way of the defendant's telephone call for emergency assistance. Upon arrival, the investigating officers observed the defendant sitting outside of a cabin, and upon questioning, were told by the defendant that he and his wife had been attacked. The officers entered the cabin and immediately found that the defendant's wife had been murdered. The crime scene was secured, and the defendant was taken to the hospital for treatment of his wounds.

The police officers returned to the crime scene, and thereafter again entered the cabin. During the course of the search, the investigators opened an unlocked briefcase in the cabin, and seized photographs tending to incriminate the defendant.

The defendant was charged with murder and thereafter convicted. In view of the obvious investigatory nature of the search, the United States Supreme Court reversed the decision of the West Virginia courts because of the police officers' failure to obtain a warrant.

The case at bar is similar to *Flippo* in virtually every material respect. In light of the Commonwealth's evidence that the Petitioner's personal belongings were seized for their evidentiary value, and in view of the focus of the investigation on the Petitioner at the outset, all physical evidence should have been suppressed.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that Your Honorable Court grant the instant petition and issue a Writ of Certiorari to the Pennsylvania Superior Court.

Respectfully submitted,

Patricia M. Hoban, Esquire

APPENDIX

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Com. v. Hellwig, No. 5253/96 (Trial Court) A1

Com. v. Hellwig, No. 00191 EDA 1999 (Appeal) A47

IN THE COURT OF COMMON PLEAS OF BUCKS COUNTY
CRIMINAL DIVISION

Commonwealth of Pennsylvania : No. 5253/96
:
:
:
Kathryn Hellwig :

MEMORANDUM OPINION

This is a rather unusual case. Defendant reported to police that she was the victim of a kidnaping and shooting on April 19, 1996. During the next few weeks, Defendant provided the police with two additional written statements concerning the abduction and shooting. Among Defendant's statements there were several radical inconsistencies and contradictions. Upon investigating Defendant's claims and reviewing her statements, the Warminster Township police department concluded that Defendant had not been the victim of a kidnaping and that she was not shot by an abductor as she had alleged.

Defendant was charged with unsworn falsification to authorities and making false reports to law enforcement authorities. After a two-day suppression hearing, the Court denied all of Defendant's motions to suppress and granted the Commonwealth s motion in limine with respect to the suppression hearing. At the conclusion of a two-day trial, a jury convicted Defendant on both counts. The Court sentenced Defendant to not less than three months and not more than twenty-three months imprisonment and ordered Defendant to undergo a mental health evaluation and to comply with the evaluations recommendations. Defendant has appealed to our Superior Court.

Statement of the Facts

In the early morning hours of April 19, 1996, Sergeant Anthony Ginaldi, an on-duty policy officer with the Philadelphia police department radioed his precinct that his girlfriend, Defendant, was the victim of an abduction and shooting. Sergeant Ginaldi reported that the victim was at the Yum Yum Donuts shop parking lot on County Line Road and that she needed medical assistance. Upon arriving at the scene, Sergeant Ginaldi waved down a passing officer from the Borough of Hatboro, Montgomery County police department. Immediately thereafter an EMT arrived, followed by officers from Warminster Township and ambulance personnel.

Defendant was seated in the driver's seat of her Ford Bronco with a gunshot wound to her upper right thigh. She reported to the police that she had been kidnaped at a MAC machine on Grant Avenue and Academy Road in Philadelphia. She stated that when she returned to her vehicle after withdrawing $100.00 from the walk-up MAC machine, a man popped up out of the back seat and told her to take him to Defendant's five-year old daughter Maria, who was staying at the home of Defendant's father s that evening. Defendant reported that she drove around for a long time before the abductor finally noticed that she was not taking him to Maria. Defendant told the police that she stated tot he abductor, "Oh, you finally caught on." At that time Defendant made the decision to pull into the parking lot of the Rosemore Shopping Center. She pulled out her gun because, she told the police, she wanted to end the situation and she wanted to shoot the abductor before he shot her. The abductor lunged over the front seat, pulled the gun away from Defendant and shot her in the upper right thigh. Defendant reported that the abductor then left the vehicle through the passenger-side door and jumped into another vehicle, which was sitting in the parking lot. Defendant proceeded to leave the shopping center

parking lot in her Bronco. Almost immediately thereafter, Sergeant Ginaldi called her on her cellular phone. Defendant told him what had occurred and that she was turning into the parking lot of the Yum Yum Donuts shop.

When questioned by police at the scene, Defendant told Officer Michael Davis of the Warminster Township police department that she was unable to describe the get-away vehicle used by the abductor. (R. at Vol. I (Suppression), 22). However, at some point on April 19, Defendant apparently told the police that the get-away vehicle was a blue Chevy Blazer. She also reported that she could not describe the abductor because she did not see him. (R. at Vol. I (Suppression), 22).[1] Furthermore, although Defendant claimed that she had withdrawn $100 from the MAC machine immediately prior to the abduction, officers found only four twenty dollar bills, five one dollar bills and some coin change in Defendant's purse with her MAC receipt. (R. at Vol. I (Suppression), 72).

On April 20, 1996, Detective Bridgette Durso, of the Philadelphia police department, located a blue Chevy Blazer fitting the description provided by Defendant at the home of Janet Camacho, the aunt of Defendant's daughter.[2] Defendant positively identified the Blazer as the get-away vehicle. However, Johanna Camacho reported that the vehicle had not

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[1]Defendant's sister, Suzanne Heliwig, testified that Defendant told her later at Abington Hospital that she could not identify the abductor because he was wearing a mask.

[2]The father of Defendant's daughter Maria is Carmello Camacho, who was at the time of this incident, and remains, incarcerated. Carmello Camacho s sisters, Janet and Johanna Camacho, and his father live in Philadelphia. Janet Camacho works for Allstate Insurance Company in King of Prussia. Johanna Camacho is a registered nurse at Albert Einstein Medical Center.

been used in eight months. An inspection of the vehicle at the police garage revealed that the van had not been driven for some time. (R. at Vol. III, 213). The officer who inspected the vehicle found that the motor was covered in rust and debris, the tires were very low and the visor of the car was dirty, all of which indicated that the vehicle had not been used in some time. (R. at Vol. III, 206, 209). There was also rust on the air conditioning unit, which the officer explained would not be present if the vehicle had been used for even a short period of time. (R. at Vol. III, 210).

On May 1, 1996, Defendant went to the Warminster Township police station to provide the police with a written account of what had occurred on April 19, 1996. She did so per a request of Detective, then Sergeant, Mosiniak, of the Warminster Township police department, who told Defendant that he would like to obtain a written statement from her when she was feeling well enough to come into the station. She was brought into the station by Sergeant Ginaldi, who was her live-in boyfriend.

The written statement provided many new details and differed in several respects from Defendant's prior statements about the events of April 19. In the May 1, 1996 statement, Defendant provided the following account:

> It all started about one week (around Easter) prior to 4/19/98. I received a phone call on my cell phone voice mail from Johanna Camacho. On that message she said, "Hello, Kathy, this is Johanna. This has gone on for way too long and it is time we talk. Call me. My pager number is _____. My home phone number is _____." I did not return that call. Then again, a couple of days before 4/19/98 I believe (around dinnertime) it was Wednesday, 4/15/98 or 4/16/98, I received another call. And she basically said the same thing as before, for me to call her, and it is

important that we talk and that we needed to get some things straight, and it was important for me to call her back. And again, she left her pager and home number.

I tried calling her back a couple of times. And when I finally reached someone, it was Johanna's sister Janet on the phone. She started yelling and screaming right away, saying, "You have taken away all of Maria's family, her aunts, uncles, grandparents, et cetera, and you are denying her heritage, culture, everything. We are her family too. She is part of my brother. We have family that hasn't even met Maria."

She also went on to say that her dad had just recently had his leg amputated and her dad needs her family right now. She said her dad had gone to see her brother up at Camp Hill and soon he was going to get transferred to Gratersford because he was supposed to be coming up for parole in June 1998 but because of his behavior, he has been in the hole so much that he probably won't be getting out until June 1999, and that her dad can't be going to see him as much anymore because he can't drive since he had his leg amputated, and now he has to depend on the family for everything. And that is why he wants to see Maria, because she is a part of her brother. And her dad now realizes that he is not getting any younger and his health is not the best. He is very sensitive and gets upset because now he realizes how important his family is to him.

I said, "Tell me one thing. Why now? You haven't bothered with Maria in years. She will soon be six years old and where has everyone been up to now? I will never let Maria be part of your lifestyle, that environment, drug dealing, everything, no way."

She (Janet) jumped right back in and said, " We

are her family." She said, "I don't care what you say. We are going to do this one of two ways. Either go to court or my way."

I said, "So what is your way?" She said, "You'll see." I said, "Well, I really don't care what you say because over my dead body will Maria ever be a part of your way of life. I have raised her without your help alone. I have done it and I will continue. Maria has a nice, stable home and that is all that matters."

Janet said, "Even your mom totally agrees with us. She fully agrees. And she was just full of a lot of helpful information."

I said, " What info did my mom have to say?" She jumped right in and said "a lot." But she wouldn't say anything else. I said, "Well, it really doesn't matter what shit you and my mom talked because both of you are just trash and that is why I don't even want to bother with either one of you. Now you know why."

She again wouldn't let me keep talking. She said, "I have waited a long time to say this and now you are going to listen. We will be a part of Maria's life. It doesn't matter if you like it or not." She said, "I bet she doesn't even know how to speak Spanish or that she is even Puerto Rican and proud of it. We want to take her to Puerto Rico and have her meet her family and learn about her culture and heritage. That is something you can't give her. She belongs with family and she needs to know us."

I said, "No way. It will never happen. You never cared in the past so why should I care what you think or even what you want?"

Janet said, "We will win. We have power and money. And even your own mom agrees with us. So get ready for a fight." I said, "You can say whatever you want but our lives have been very peaceful up until now and that is the way that they are going to stay."

Janet said, " I told you before we will win one way or the other." I said, "Well, I told you no matter what happens, Maria will stay with me. I have raised her alone and over my dead body will she ever be a part of your way of life."

She said, "Yeah. We will see about that." And I just hung up.

On Friday, 4/17/98 I came home from running errands around 11p.m. And as I pulled up onto my driveway I noticed someone on the side of our house between our fence and the neighbor's fence. And as soon as they saw my headlights when I pulled up into the driveway, they quick turned back. And then he tried to run in between the fence to the back of the house but there wasn't enough room so he just hopped over the fence into the neighbor's yard.

As all of this happened, an 8th District car was driving up the street and it just so happens that it was my brother-in-law, Officer Daniel Shellhammer. He shines his spotlight on me just playing around and that is when I waved him over fast and I told him what I saw.

So he ran back but it was too late. He didn't see anything. So he told me to go in the house and check the back doors and just check and see if anything was out of place. So I did. And everything looked fine.

So he said, "Just go in and lock the door and if anything happens, just call 911" and that he would drive by and just check on me and for me not to worry.

So when I got in the house, I paged Tony to let him know I was home. When he called back, I told him what happened. And he said he would make sure someone checked and just drove by to make sure that everything was okay.

On Saturday, 4/18/98 I was called into work unexpectedly to work 12 midnight to 8 a.m. Tony left for work at 10:30 p.m. same as normal. After he left, I got ready to goto work, got dressed, had coffee and sat down to watch the news. It was around 11:20 give or take a few minutes and I was waiting to see the weather. And I heard a knock on the door several times and the doorbell rang several times. While I didn't get up right away because I was watching the news and also hesitated because no one ever knocks on our door at that time of night.

By the time I went to look out the peephole I couldn't see anyone so I looked out the kitchen blinds. After I turned off the light, I saw someone walking down the walkway. And they got into a 96/97/98 new model GMC Jimmy or Blazer, all black truck.

And at first they were parked in front of my driveway. But then they backed up. they were just sitting there.[3]

So I waited and I looked out the blinds a few

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[3]The evidence revealed that the vehicle belonged to a woman attending a party at the home of one of Defendant's neighbors.

minutes later and it was still parked there. So I paged Tony and I paged him a few times. When he called me back, I told him what happened and that I was nervous because I had to go to work but that the house was going to be left alone and that bothered me because of what happened last night. He said, "Kathy, don't worry, you have to goto work. You have your gun and your mace. Stop worrying and just goto work." He said that he would have a car come out and check on things for me but to just go and stop worrying. So I did.

I went out, got in the truck and backed out of the driveway. And then I went to MAC at Grant and Academy at the drive-though MAC.[4]

And after I made my transaction, I pulled out and turned to go back out the driveway. And I was still putting my MAC card in my wallet and putting it in my pocket when out of the corner of my eye in the rear-view mirror I saw something move and that fast he was next to me.

And he put a gun to my right arm, elbow, and said, "Don't move, I wouldn't want to have to shoot you." He started quickly talking about Maria He said, "I know that Maria is with your dad and I know that your dad works near Jacksonville and Street Road. that is where I want you to drive. And make sure that you keep your hands on the wheel. Both hands," he yelled.

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[4]Defendant had earlier told police that the MAC machine was a walk-up MAC machine and that she had first noticed the abductor upon returning to her vehicle after using the machine. Defendant changed her statement after police questioned her about the fact that the MAC machine at Grant and Academy is a drive-thru MAC machine.

So I did. I drove to Academy Road and got onto 1-95 northbound going towards Woodhaven Road exit. And I got off at Woodhaven and I went off the wrong ramp tot he right so I just followed it back around. I got back on Woodhaven Road and went to the Roosevelt Boulevard to Street Road and followed Street Road to Jacksonville.

As we were driving, he was saying that Maria belongs with the family and that she needs to know about her family. He said that I was never going to see her again and that they already had the tickets ready for her to go with them to Puerto Rico.

He said, "We believe that this is best and we are going to take her to Puerto Rico where she can grow up and be proud to be Puerto Rican."

He said there is a communion party that was very important to the family and everyone wanted Maria to attend.

I said that no one ever cared so why now? I said, "Why? Just why?" He said, "She is a Camacho and she needs to be with her family and learn about her culture, heritage, meet her family, cousins, aunts, uncles, grandparents and learn to speak our language. That is the way it has to be.

"He said a lot of things as we were driving all throughout the night and I am just saying as much as I remember but the time is all mixed. I was so nervous.

When we got to Jacksonville and Street Road, he said, "Okay, I know that your dad lives around where he works. Now take me there."

I said, "I don't know how to get there from here. I never came this way before."

He said, "Well, you better get me there." So I turned down, I am not sure of the street but I know that I made a left and I was just driving and driving.

He kept saying, "You better take me to her and keep your hands on the wheel. I wouldn't want to have to shoot you." He said it over and over. Maybe fifty to a hundred times.

I got lost and he was getting more and more mad. I remember seeing Dresher Road but I am not sure how we got to County Line. But we did. And I remembered my deceased grandmother used to live at Maple and County Line. I was very scared to drive near the city because he would know that I wasn't going to my dad's.

He was saying that even my own mother said that Maria needs to be with her family and that she even agrees. I said, "What did my mom have to say because no matter what, Maria belongs with me."

He said, "Well, let me tell you how serious I am. You said that over your dead body would Maria ever go with anyone. Well, don't worry because that can be arranged."

Just then we were driving on County Line Road near Rosemount [sic] Shopping Center. He said, "Come on, what the fuck are you doing?" I said, "Wow, you finally figured it out." He was mad and said, "Pull over." So I made a right into the Rosemount [sic] Center. And I pulled over into a parking spot near the consignment shop.

He was mad and I knew he was going to shoot me so I went to pull out my gun and that fast he was in the front seat and was twisting my arm, and we were fighting for my gun and he had it up to my face and back and forth.

Then he pulled it out of my hand and shot me.

All I could hear was ringing and I couldn't move. He jumped out of the passenger side door and got into a late 80s, 87/89 Blazer, dark blue, with a hardcover for the spare tire and louvers over the windows. And they drove off. I couldn't move, scream, nothing. Then I saw them leave and I thought, no way are you going to leave me this way. I drive off after them. I pulled out of the shopping center and I made a right and I tried to follow. But I started sweating hot/cold. I rolled down the window. I was in so much pain.

Then my cell phone rang and when I answered it, it was Tony. It was about 1:40a.m. I told him that I was on County Line Road at the Rosemount [sic] Shopping Center but that I didn't know where I was – north, south, east, west – but that I was going after them.

R. at Vol. III, 30-43.

Over the next few days, both Defendant and Sergeant Ginaldi called the Warminster police department again to ask if Defendant could come into the station yet again to provide another statement. She wrote out for the police a third statement, which again provided details which were significantly different from the description of the events she had provided before:

I received a voice mail message from Johanna saying, "Kathy, this is Johanna. This has gone on for way too long and we need to talk. My pager number is _____. My home number is _____." But I did not return her call. Then I received another call from Johanna saying, "Kathy, you need to call me back. One way or another we will talk. Call me!" Later I called directory assistance to get the phone number because she didn't leave it. I called that number and there wasn't an answer. So I called directory assistance again just to make sure I had the right number. I tried to call a few times but there wasn't any answer. So I called again one morning from a pay phone between 8:00 a.m. and 10:00 a.m. and Janet answered the phone. She started yelling, "We are Maria s family too. You are denying her family, aunts, uncles, grandparents, cousins, etc. She has a right to know us and her culture and heritage. My dad has had his leg amputated and now he can't get around. He can't go see my brother as much because he can't drive and now he depends on others to do everything for him. He wants Maria to be a part of his life and our family because she is a part of my brother. My dad realizes that he is not getting any younger and his health is not so good and he realizes now what is important - his family." She mentioned about her brother (jail, parole). She said that she has waited a long time to say all of this and that I was going to listen. I said, "Well, why now? Maria will never be part of that lifestyle or environment." She said, "Well, even your mom agrees with us. She totally agrees." I asked her what she said but she wouldn't answer me. I said, "Well, I really don't care what either one of you has to say because both of you are trash and that is why I don't bother with either of you." She said, "We talked to your mom a couple of times and she was just full of info. She told us where you live. She even gave us directions, what kind of car

you drive, everything about you we know." I said, "Well, if you know so much then why are you calling me!" She said, "I know who you live with. I know that *he is a cop. Hey, well what is* another cop. We have taken care of them before. We have watched Maria play outside at school. You are not safe anywhere!" I said, "I have raised Maria. I have cared for her alone and over my dead body will she ever be apart of your family, lifestyle and environment. Never!" She said, "Well, we are going to take care of this one of two ways, either goto court or my way!" I said, "What is your way?" She wouldn't answer me so I said, "Well, you heard what I said. Maria isn't going anywhere and you and your family better stay away from me and my family." Janet said, "Yeah, you ll see," and hung up.

Around 11:00 p.m. Friday night 4-17 I was returning home from running errands and as I pulled into our driveway I saw someone between our fence and our neighbor's fence. He tried to go towards to the back of the house but then he hopped over the fence and into the neighbor's yard.

Saturday, 4-18 I received a call around noon from work to come in and work midnight. Tony left for work at 10:30 P.m. and I was getting ready for work when around 11:15 - 11:20 p.m. someone knocked on the door and rang the doorbell several times. I didn't answer it because of all of the recent threats and no one ever knocked on the door at this time of night. But after the bell stopped ringing and the knocking stopped In [sic] waited and then I looked out the front blinds and I saw someone walking down the walkway and a black GMC Jimmy/Blazer was parked out front and in front of the driveway. This made me nervous and when I looked out the blinds again I saw the truck now parked in front of the house. So I paged Tony and when he

called me back I told him about what happened and he said, "Stop worrying. I will send someone to check on the house. Just goto work and stop worrying. You have nothing to worry about. You have your mace and gun. Just goto work." So I did! But I was very nervous. On the way to work I stopped at the drive-thru MAC at Grant and Academy Police and Fire Credit Union and I withdrew $100. I checked my voice mail and it started beeping "new message" when I turned it on so I checked the message and it said, "Kathy, this is Janet. Meet us at Neshaminy Mall across from Strawbridge in the commuter parking lot, but if you don't come to us then we will come to you. Just meet us!" So I did. I was very afraid that they (the Camacho family) would come to my house, work, Maria's school, Tony while on duty and try something. I wanted to confront the problem before it came to me. I never wanted my family to get hurt. So I went to Neshaminy Mall and a black Pathfinder pulled up next to me on my right and that fast a Hispanic male was in my truck. He had a black gun in his right hand and he said, "Let s go. Drive to Street Road so we can meet Janet and Johanna and keep your hands on the wheel so I wouldn't have to shoot you." The Pathfinder was gone and I heard it pull out and I drove to Street Road except I went the wrong way and he started yelling, "You are going the wrong way. Come on turn around." So I went around the jug handle and got back onto Street Road. The time we were driving he was talking about how, "we deserve the right to have Maria. She needs to know about her culture, her heritage. We already have tickets ready for her to goto Puerto Rico. She belongs to us!" He said that he remembered me from years ago and that I never should have messed with this family. Because everything that they want they will get one way or another. He said that he has been to my house, my work, even in my truck. He said that even my mom totally agreed with the

family and that she gave them a lot of helpful info. He said, "That since big Carmello had his leg amputated he is even more focused on his family and that Maria is a part of his own Carmelito." I said, "Where has everyone been for the past six years?" He said, "Just drive!" When we approached Wal-Mart he pointed to the left - "pull in here" - pointing to Wal-Mart, so I made a left into Wal-Mart driveway and when we were halfway thru to parking lot he said, "Okay, stop a minute." So I stopped and then a few seconds later he said, "Okay go" and he pointed out the exit and directed me back onto Street Road and he said, "Okay, goto Justa Farm on County Line Road." I said, "I don't know how to get there or even where it is." He said, "Okay, make a left," pointing to a street and I made a left but I don't know the name. He said, "We are going to meet Janet and Johanna." While I was driving I got lost driving and turning down different streets but I do remember passing a McDonald's. It was to the right of me. Eventually we reached County Line Road because we came to a dead end and County Line Road was the only street that we could turn onto. He said,"now go left" and I said, "no, right," because I wanted to go towards the city and I thought it was right. He said, "okay," so I turned right and drove for a while. Then he started yelling, "What the fuck are you doing?" He said over and over, "you better keep your hands on the wheel. You are going the wrong way, pull over, pull over," and he pointed to the Rosemont Shopping Center lot so I pulled over and parked the truck. He started yelling, "What the fuck," over and over again. I said, "Well, let me call my voice mail and check if Janet and Johanna called." He said, "Okay, but you better not talk." So I checked my messages and there was only three messages/hang up and 2 messages from Tony. He said, "Okay, get your hand back on the wheel and put that phone down." Then the passenger door opens and

a person with a mask and gloves is standing there and the first male in the truck says words in Spanish then climbs in the back set and the 2 male sits in the passenger seat. the first male says to me, "Okay drive," as he put his gun to my elbow and the 2 male says, Okay let s fucking go." I said, "No! What's going on. I m not going." The 2 male says, "You better watch what you say when you said 'Over your dead body' because that can be arranged. Because without you here Maria belongs to us." That is when I pulled out my gun and that fast the 2 male twisted my arm and we were fighting for my gun. He was trying to (???) it towards my face and then he pulled hard a [sic] took my gun and said, "This one's from us, " and shot me. The male in the back seat said, "OOH," and they jumped out and I heard mumbling but my ears were ringing and I couldn't understand. A blue blazer type vehicle pulled up on the right a little beyond my passenger side door and they were gone. All I remember seeing was the hard blue tire cover with the silver ring and something over the window. I believe rain guards. I couldn't move and my ears were ringing but I couldn't just let them leave me this way. So I drove after them and made a right out of the lot. A few minutes later Tony called me and I couldn't tell him where I was because I did know and I drove back and forth trying to figure out which way because I could even see the blue blazer type vehicle and now I was started to sweat and get hot and cold. Tony kept saying, "Tell me what happened because if you don't tell me or let me know were you are at I can't send anyone to help you." I said that I was near my grandmom's at Maple and County Line.

I knew that they were going to kill me and I know that they are not going to stop. Maybe not today, or tomorrow, but they are going to kill me. I have known this family for about 10 years and the Camacho

family is to be feared.

Issues

Defendant raises several issues on appeal.

I. Suppression Hearing

Defendant's first argument is that the Court erroneously denied Defendant's motion to suppress her statements to the police. Defendant asserts that police officers failed to advise Defendant of her Miranda rights and that her statements were not knowingly and voluntarily made. We find that it was not necessary for the police to administer Miranda warnings because Defendant was never subject to custodial interrogation and that Defendant's statements were made knowingly and voluntarily.

Defendant was questioned by police officers concerning the shooting and alleged kidnaping on a number of occasions. She was first questioned by police at the Yum Yum Donuts parking lot. The evidence clearly shows that the sole intent of the officers at this point was to gather information from someone they believed to be the victim of a crime in an attempt to apprehend the perpetrator as quickly as possible. At the time, the police believed that there was an armed suspect at large in the area who posed a threat to Defendant's daughter and to the safety and well-being of the community.

One of the first persons to arrive at the Yum Yum Donuts on the night in question was Officer Michael Davis. Officer Davis testified that when he arrived at the scene, there was an EMT present who was providing Defendant with medical attention. (R. at Vol. I(Suppression), 14, 36).

Ambulance personnel arrived within five minutes of the officer's arrival and provided Defendant with medical care while Officer Davis asked her questions about what had occurred. (R. at Vol. I (Suppression), 29, 10 1-02). The officer's testimony reveals that the officer's questioning of Defendant could by no stretch of the imagination be classified as a custodial interrogation:

> Q: What was the purpose of you asking her question at the Yum Yum Donuts parking lot?
>
> A: She appeared to be a victim of a crime and I wasn't trying to determine what happened and who might have caused the crime.
>
> Q: Did Ms. Hellwig in fact inform you at that time that she in fact was a victim of a crime?
>
> A: Yes.
>
> Q: How long did you talk to her at the scene?
>
> A: I spoke with her for approximately ten, fifteen minutes I guess.
>
> Q: What kind of information were you trying to obtain from Ms. Hellwig?
>
> A: Initially I was trying to obtain pertinent information for flash information I gave out to other officers just such as what occurred, who might have committed the crime, what a description might be of any vehicle or weapon they might have used, and where they might have been last seen.
>
> Q: those types of questions you were asking Ms. Hellwig during that five to ten minute interview?

A: Yes.

Q: During that period of time did Ms. Hellwig indicate to you in any manner verbally or physically that she did not wish to speak to you?

A: No.

Q: Did she at any time indicate that she didn't want to answer any further questions that you have about other allegations of injury?

A: No.

Q: Did she at any time request to speak to counsel or a lawyer?

A: No.

Q: How would you describe her demeanor during the course of the interview?

A: Ms. Hellwig was very calm, seemingly unemotional. She seemed very relaxed for the situation.

Q: And when you were talking to her while she was still seated in the driver's seat of the Bronco, did you ever in any fashion restrict her freedom of movement?

A: No, not at all.

R. at Vol. I (Suppression), 15-18.

Police officers also questioned Defendant before and after she underwent surgery in an attempt to elicit further information from someone they believed to be a victim.

Officer Carol Battistini of the Warminster Township police department accompanied Defendant in the ambulance during the ride to Abington Hospital. Officer Battistini testified that she did not advise Defendant of her Miranda rights prior to speaking with Defendant in the ambulance because "[t]here was no reason to. She was the victim of a shooting." (R. at Vol. I (Suppression), 42). Officer Battistini's purpose in questioning Defendant was to "[g]et information about the person who had shot her so that he could be apprehended." (R. at Vol. I (Suppression), 42). Defendant was receiving treatment from ambulance personnel throughout the course of the conversation. (R. at Vol. I (Suppression), 44). Officer Battistini testified that Defendant was cooperative in answering her questions, Defendant never refused to answer her questions and that Defendant never asked to speak with an attorney. (R. at Vol. 1 (Suppression), 42-43). The officer further testified that she never restrained Defendant, restricted her freedom of movement or gave her any instructions regarding where Defendant should go or do. (R. at Vol. I (Suppression), 43). The officer "treated her as if she were a victim. I tried to give her, you know, every comfort and confidence that I could that we were helping her and that we would catch the person who had shot her, that she would be okay." (R. at Vol. I (Suppression), 44).

Officer Battistini again spoke with Defendant approximately one hour after her surgery to ascertain if Defendant had any further information to provide to the police. (R. at Vol. I (Suppression), 49). Officer Battistini did not read Defendant her Miranda rights at this time either because at that time she considered Defendant to be a victim of a crime, not a suspect. (R. at Vol. I (Suppression), 50). Officer Battistini testified that Defendant did not appear to be under the influence of medication. (R. at Vol. I (Suppression), 49). Defendant appeared alert and never indicated to Officer Battistini that she did not understand the officer's questions. (R. at Vol. I (Suppression), 49).

Defendant was also interviewed by Detective Charles Wilson, of the Warminster police department, for about twenty to thirty minutes in the emergency room at Abington Hospital at approximately 5:30 a.m. after Defendant had returned from surgery. (R. at Vol. I (Suppression), 63, 64). Detective Wilson testified that he did not read Defendant her Miranda rights prior to questioning Defendant because "[s]he was the victim of a shooting" and that Defendant continued to claim throughout this conversation that she was the victim of a crime. (R. at Vol. 1 (Suppression), 64). Detective Wilson stated that the purpose of questioning Defendant was "[t]o obtain details of the incident and find out as much as we could about the perpetrator, who we were looking for, what kind of car, how many there were and things of that nature." (R. at Vol. I (Suppression), 64-65). Defendant did not appear to be under the influence of medication at the time, but rather appeared lucid. (R. at Vol. I (Suppression), 65).

Detective Mosiniak interviewed Defendant at the hospital on the morning of April 19, 1996 at approximately 6:00 am. (R. at Vol. I (Suppression), 103). Also present during this interview were Detective Durso, from the Philadelphia police department, and Sergeant Ginaldi, who left the room shortly after the interview began. (R. at Vol. I (Suppression), 105). Detective Mosiniak testified that he did not read Defendant her Miranda rights prior to conducting this interview because he believed that she was the victim, not the perpetrator of, a crime. (R. at Vol. I (Suppression), 106). The Detective testified further that:

> Q: At that time did you suspect her as having committed any crime?
>
> A: No.
>
> Q: Did you in any way physically restrain her from either leaving the hospital or her physical

movement in any manner?

A: No.

Q: Either before this interview, during or after did she ever indicate to you that she did not want to answer your questions?

A: No.

Q: Did she ever indicate to you that she did not want the Warminster Township Police Department to investigate this case?

A: No, she never indicated that.

Q: Did she during the course of that morning continue to insist that she was the victim of a crime?

A: Yes.

Q: Did she ever ask for an attorney?

A: No.

Q: During the period of time that you were talking to her, did you form an opinion that she was under the influence of either medication, alcohol or any other drug?

A: No, not at all.

Q: Did she appear to be alert to you?

A: Yes.

. . .

Q: Did she ever indicate to you that she couldn't answer your questions because she was in too much pain?

A: No.

Q: Did she ever say she couldn't answer questions because she was, you know, too doped up?

A: No.

Q: Did anyone in your presence threaten her or coerce her?

A: No.

Q: Did you accuse her or anyone else in your presence accuse her on that particular morning of committing a crime?

A: No.

R. at Vol. I (Suppression), 106-08.

Officers also questioned Defendant at the Warminster Township police station on two separate occasions in the following weeks. The first time, Defendant and Detective Mosiniak arranged for Defendant to go to the Warminster police station after Detective Mosiniak advised Defendant at Abington Hospital and during subsequent telephone conversations that he would like to obtain a written statement from her when she was feeling better. On the second occasion, Defendant approached the police to ask if she could make a statement to them. During both occasions, Defendant was never in custody while at the Warminster station and was always free to leave should she have desired to do so.

On May 1, 1996, Defendant met with Detective Mosiniak at the Warminster police station. Detective Mosiniak testified that the purpose of asking Defendant to come to the station "was basically to go over the facts again, to get the entire story due to the fact that she had some time to recover, to think about it, to possibly recall more information, and also to go over some inconsistencies." (R. at Vol. I (Suppression), 130). Defendant first wrote out a statement regarding the alleged kidnaping and shooting. Defendant was left in an interview room by herself to write the statement. Detective Mosiniak told her to take as much time as she needed. (R. at Vol. I (Suppression), 131). Afterward Defendant completed her written statement, Detective Mosiniak questioned her regarding the statement because;

> I had read the statement, and upon reading it there was a lot of information in there that I hadn't been aware of prior to that time. There was also a lot of information in there that was inconsistent with some facts that I had already found out. And the purpose of the oral interview was to ask questions about what I had read.

R. at Vol. 1 (Suppression), 135.

As the testimony reveals, Defendant was free to leave the interview at any time:

> Q: How did that interview tenninate; can you explain that?
>
> A: How did it?
>
> Q: How did it end? How did it terminate?
>
> A: I believe at the end of the interview the last

phase of the interview was me pointing out inconsistencies and, specifically certain things, one at a time and asking Kathryn to explain them. Towards the end she asked if she could leave and I told her yes, she was free to leave at any time she wanted. She didn't. She sat there, continued to speak to me, and I got to the end of what I determined to be the inconsistencies and my questions about them and we finished.

R. at Vol. I (Suppression), 136.

Defendant returned to the Warminster police station on May 6, 1996 to write another statement. This meeting took place at Defendant's request. (R. at Vol. 1 (Suppression), 152). With respect to this meeting, Detective Mosiniak testified:

Q: During your contact with Kathryn Hellwig on May 6Ih, was she in any way physically restrained?

A: No.

Q: Did she ever ask to leave the police department?

A: No, she did not.

Q: Did she ever ask for an attorney?

A: No.

Q: Did she ever refuse to answer your questions or anyone's questions that you're aware of during your contact with her?

A: No, not with my contact with her.

Q: During your period of contact with her on that date, did she ever indicate to you that she didn't want you to investigate the crime that she had reported to your department?

A: No.

Q: At the end of the interview with other detectives,[5] was she allowed to leave the building?

A: Yes.

Q: Did she in fact leave?

A: Yes.

Q: Did you tell her that you would be in contact with her later?

A: Yes.

Q: Did you ever advise Ms. Hellwig on that date that she was under arrest?

A: No.

Q: Did you ever accuse Ms. Hellwig of committing a crime on that date?

A: No.

R. at Vol. 1 (Suppression), 155-56.

For the foregoing reasons, we find that none of the

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[5]Defendant voluntarily submitted to taking a polygraph test that day as well.

statements provided to the police was the product of custodial interrogation. The purpose of questioning Defendant was to obtain information from a crime victim. Furthermore, Defendant voluntarily went to the Warminster police station to answer questions on two occasions. The second time, she approached the police to ask if she could come into the station. Defendant was free to terminate either of the interviews at the Warminster police station at any time. Furthermore, we find that Sergeant Ginaldi never acted as an agent of the state with respect to any attempts to obtain information from Defendant. The evidence in this case makes clear that Defendant's protestations that she was the subject of a custodial interrogation and that her statements were not knowing and voluntary are simply not believable.

b. The Commonwealth did not conduct an unreasonable search and seizure of Defendant's belongings

Defendant also contends that police officers conducted an illegal search and seizure of her belongings, including a pocket book, money, pager, change purse, clothing, cellular telephone, MAC card receipts and a gun. We cannot agree. The evidence clearly reveals that the police officers retrieved those items from Defendant and her vehicle in an attempt to secure evidence of a crime at a time when they considered Defendant to be a victim of a crime.

Detective Michael Mosiniak directed the other officers activities in the Yum Yum Donuts parking lot that morning. He advised Detective Selisker that he was in charge of securing the Bronco. (R. at Vol. I (Suppression), 99). He told Sergeant McMahon that he would like for Officer Battistini to accompany Defendant to Abington Hospital and for Officer Davis to go to the hospital as well. (R. at Vol. I

(Suppression), 99). Detective Mosiniak also sent Officer Baxter to Rosemore [sic] Shopping Center, where Defendant alleged at this point that the shooting had taken place, to ascertain whether there was any evidence or signs of a crime scene at that site. (R. at Vol. I (Suppression), 100).

Officer Davis testified that upon arriving at the Yum Yum Donuts shop, he approached Defendant's vehicle and noticed a revolver sitting on the front passenger seat. He immediately "secured it as evidence and for safekeeping." (R. at Vol. I (Suppression), 22). Officer Davis also followed the ambulance transporting Defendant to Abington Hospital to secure additional evidence:

> Q: When you testified that you were there to secure evidence, what evidence were you there to secure?
>
> A: Her clothing, any personal items she had with her.
>
> Q: Specifically did you seize or take into your possession at the hospital the clothing that she was wearing at the time?
>
> A: Yes.
>
> Q: Did that include her jacket?
>
> A: Yes.
>
> Q: What else did you seize at the hospital?
>
> A: Her jacket, her shirt, her pants, her sneakers; I believe her socks.
>
> Q: Where did that occur? Where were you

when you took those things into your possession?

A: I guess it would be called an examination room.

Q: Was Ms. Hellwig present?

A: Yes.

Q: Was she conscious?

A: Yes.

Q: When you took those items, did she object to you taking those items?

A: No.

Q: Did she ever say to you that you couldn't take those items?

A: No.

Q: When you seized those items, did you consider that to be evidence of the claimed abduction, kidnaping and shooting?

A: Yes.

R. at Vol. I (Suppression), 24-2 5.

Throughout this entire period, Defendant continued to insist that she was the victim of a crime. (R. at Vol. I (Suppression), 26).

Detective Wilson later removed the items retrieved by Sergeant Mosiniak from the trunk of a police cruiser, where

they had been stored and transported them to the forensics room at the police station. (R. at Vol. I (Suppression), 69-70). With respect to these items, Detective Wilson testified as follows:

Q: Can you tell the Court what evidence you took into evidence?

A: I don't have the list right in front of me but there was a jacket, there was a pair of jeans – I believe black jeans – shoes and socks, underwear, and inside the jacket was a small change purse. I believe there was a beeper there also.

Q: Now, in reference to the jacket, the victim's jacket that you received at the Warminster Township Police Department, did you search the pocket of that jacket?

A: Yes.

Q: For what purpose?

A: Inventory.

Q: Can you explain why you were going to inventory those items?

A: Yeah. Well, number one, we had to hang the clothes to air dry because they were blood-stained. We didn't want blood getting on anyone else that hadn't been already contaminated, and plus we inventory everybody's personal effects when we have something like this in the police station and we log it in, what's there, to safeguard that property from false claims against the police department in the future.

Q: What was found inside the jacket pocket?

A: I would term it a small change purse with money. I believe there was a MAC card and a couple of MAC transaction receipts, some coin change. There might have been one or two other items in there.

Q: When you interviewed Ms. Heliwig at the hospital that morning, did she indicate to you where this abduction began?

A: Yes. She said a MAC machine around the corner from where she lived.

Q: Did she indicate to you during that statement whether or not she made a MAC withdrawl [sic]?

A: Yes.

Q: What did she tell you?

A: She withdrew a hundred dollars from that MAC machine about 11:30, quarter to 12:00.

Q: And did she indicate after that MAC withdrawal how soon thereafter her claimed abduction began?

A: Immediately.

Q: Now, when you were conducting the inventory search of the jacket and with the change purse at the Warminster Township Police Department, once you noticed the MAC receipt and the money, at that point did you understand that was in fact evidence?

A: Oh, yes.

Q: And did you retain those items as evidence?

A: Yes.

Q: Specifically how much money did you find in that purse along with the MAC receipt?

A: Separate from the coin change there were four twenty-dollar bills and I believe five one-dollar bills.

Q: How much had she told you she had withdrawn?

A: A hundred dollars.

R. at Vol. 1 (Suppression), 70-72.

While in the ambulance, ambulance personnel cut away Defendant's clothing in order to treat her. Officer Battistini, who was also riding in the ambulance, asked the ambulance personnel to try to cut away from the bullet hole so that they did not destroy any evidence. (R. at Vol. I (Suppression), 44). Officer Battistini explained that her reason for doing so was because "there would be ballistic evidence from the bullet that possibly went through the hole of her jeans, and I felt that maybe down the road that would be matched to whoever had shot her." (R. at Vol. I (Suppression), 45). Officer Battistini was also present during surgery so that she could collect the bullet from the surgeons once they removed it from her leg. (R. at Vol. I (Suppression), 46).

Additional evidence was secured in the Yum Yum Donuts parking lot by Detective Scott Selisker of the

Warminster Police Department:

Q: As part of your duties at the scene, did you attempt to secure evidence of this alleged shooting?

A: Yes.

Q: Can you explain to the Court what steps you took.

A: The crime scene, which consisted of a blue Bronco, was already roped off. At that point as I arrived the ambulance personnel was working. So we just – the first thing we were concerned about was securing the scene, scene security. Once Ms. Hellwig was removed from the vehicle we then photographed the entire vehicle and the surrounding area. I had made a sketch of the position of the vehicles and then we went through the vehicles collecting evidence and securing items for safekeeping.

Q: Now, at the time that you were conducting this scene processing, had you been advised that Ms. Hellwig had told police she was shot in that particular vehicle?

A: Yes.

Q: Did you take that vehicle into custody as basically a limited crime scene?

A: Yes, we did.

Q: Inside the vehicle were there any items of her personal property?

A: Yes.

Q: Specifically was there a pocketbook or larger purse as distinguished from a change purse inside the vehicle?

A: Yes, there was.

Q: Did you take that item into custody?

A: Yes, I did.

Q: For what purpose?

A: Mainly for safekeeping and for personal effects which may be needed later.

Q: Did you know at the time what items would be or would not be of evidentiary value in terms of this shooting allegation?

A: No, we did not.

Q: Did you take all the items into custody from that vehicle?

A: Yes.

R. at Vol. I (Suppression), 86-88.

Q: Now, specifically the pocketbook, when was that removed from the car?

A: At the scene.

Q: Once you removed it from the car, what did you do with it?

A: I bagged it and tagged it and brought it back

to the police station where it was locked for safekeeping.

Q: Now, was an inventory search conducted on that particular item?

A: Yes.

Q: When was that?

A: As it was brought back to the station it was inventoried and locked up.

Q: Is that standard Warminster Township Police procedure to inventory items of personal property taken into evidence?

A: Yes.

Q: While you were at the WaWa, did you notice whether or not there was any cellular telephone in the blue Bronco that was being driven by Kathryn Hellwig?

A: Yes, there was.

Q: Where was that located?

A: I believe that was located on the passenger seat.

Q: Did you seize that item from the car?

A: Yes, I did.

Q: When did you seize that?

A: At the scene.

Q: At the time that you seized that telephone, had you been advised by other officers from Warminster Township that that phone had been utilized immediately after the claimed abduction?

A: Yes.

Q: Did you consider that evidence that would be necessary for prosecution of an assault, kidnapping?

A: Yes.

R. at Vol. I (Suppression), 89-91.

Defendant inquired of Detective Mosiniak about two of her personal belongings, her pocketbook and an anklet, when he met with her at Abington Hospital on the morning of April 19, 1996. (R. at Vol. I (Suppression), 110). Detective Mosiniak explained to her that all items on her person or in her vehicle at the time of the abduction and shooting constituted evidence of the crime and that for this reason the police had to retain the items at this time. (R. at Vol. I (Suppression), 110). He further explained that, should any item at some point become non-evidentiary, the police would return it to her. (R. at Vol. 1 (Suppression), 110).

Detective Wilson further testified that he also checked Defendant's pager around noon on April 19 in order to create a record of incoming calls to Defendant's pager as evidence. (R. at Vol. I (Suppression), at 74-75). Defendant had told the police that her pager had gone off during her abduction and Detective Davis checked the pager in an attempt to verify her statement. (R. at Vol. I (Suppression), 75). Detective Wilson checked the pager a second time about one week later because it continued to beep. (R. at Vol. I (Suppression), 75).

Defendant also challenges the "seizure" of cellular phone records and a videotape of the MAC machine at Grant Avenue and Academy Road.

While in the parking lot of the Yum Yum Donuts shop, Detective Mosiniak informed Sergeant Ginaldi that he would like the telephone records for both Defendant's and Sergeant Ginaldi's cellular telephones. (R. at Vol. I (Suppression), 1 14).[6] Sergeant Ginaldi agreed to provide the records. (R. at Vol. I (Suppression), 114). The cellular telephone company later informed Sergeant Ginaldi that it would not provide him with the records. (R. at Vol. I (Suppression), 115). Thereafter, Detective Mosiniak obtained the cellular telephone records through an FBI agent who subpoenaed the records pursuant to opening a federal case regarding this incident. (R. at Vol. I (Suppression), 116, 120-21).

Per the request of Detective Mosiniak, Detective Durso asked the Police and Fire Credit Union to provide her with a copy of the MAC machine videotape from April 18th to April 19, 1996. (R. at Vol. I (Suppression), 19). The bank complied and Detective Durso turned the tapes over to Detective Mosiniak. (R. at Vol. I (Suppression), 19).

We find that all of the items challenged by Defendant were obtained properly by the police and therefore were admissible at trial. With respect to items taken at the scene and from Defendant's person, we find that the police properly retrieved these items as evidence of a crime. With respect to the cellular phone records, we find that Sergeant Ginaldi provided his consent and even assisted the police in trying to obtain these records. When those efforts were unsuccessful,

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[6]The accounts for both telephones were listed under Sergeant Ginaldi's name. (R. at Vol.
I (Suppression), 114).

Sergeant Mosiniak obtained the records through other legal means. We also find that the credit union voluntarily supplied the police with the videotape from the MAC machine.

c. The Court properly refused to allow Defendant to present expert testimony of Mr. Frank Friel

Defendant argues that the Court improperly precluded expert testimony from Frank Friel, who, according to defense counsel would testify "concerning certain interrogation type of techniques when you're handling different types of victims based upon his experience "[and] custodial techniques that are used with a victim as opposed to a defendant or suspect in a case." (R. at Vol. I (Suppression), 8). Defense counsel asserts that "his expertise can certainly help as far as making a determination as to whether or not it was a custodial nature." (R. at Vol. I (Suppression), 9-10).

"Expert testimony is permitted only as an aid to the jury when the subject matter is distinctly related to a science, skill or occupation beyond the knowledge or experience of the average layman." *Commonwealth v. Counterman,* 719 A.2d 284, 302-03 (Pa 1998) (citing *Commonwealth v. 0 "Searo,* 466 Pa 224, 229, 352 A.2d 30, 33 (1976)).

Defendant's proffered expert testimony is not of the sort envisioned and encompassed by the law. The determination of whether an interrogation is custodial in nature is within the province of the Court. Expert testimony to "assist" the Court with this matter is neither warranted nor appropriate.

d. The Court properly precluded expert testimony of Lorrie Morrell

Defendant also asserts that the Court erred in refusing to allow Defendant to present the testimony of Ms. Lorrie

Morrell regarding Defendant's alleged post-traumatic stress disorder. Defendant claims that this condition impacts upon the voluntariness of Defendant's statements to the police.

The record reveals that, although the Commonwealth made a motion to exclude Ms. Morrell's testimony during the suppression hearing, the Court never issued a formal ruling on that particular motion. However, the Court did address the subject of Ms. Morrell's testimony during the trial. Our reasons for precluding Ms. Morrell's testimony at that stage in the proceedings are equally applicable to the suppression hearing.

Defendant represented to the Court that Ms. Morrell is a therapist who has treated Defendant since last summer. (R. at Vol. II, 180). Ms. Morrell would testify that Defendant suffers from post-traumatic stress disorder as a consequence of the alleged kidnaping and shooting by her abductor. However, Ms. Morrell is not the individual who diagnosed Defendant as suffering from post-traumatic stress disorder. (R. at Vol. II, 180). We therefore found it inappropriate to permit Ms. Morrell to testify regarding Defendant's condition.

Furthermore, we found Ms. Morrell's expert testimony impermissible because it serves to bolster Defendant's credibility that she was in fact kidnaped and shot by the abductor. In *Commonwealth v. Gallagher*, 519 Pa. 291, 547 A.2d 355 (1988), our Pennsylvania Supreme Court held that an expert could not opine that a rape victim suffered from "rape trauma syndrome" in explanation of why the victim was unable to identify the Defendant two weeks after the rape occurred. The Court explained that, by offering the expert's testimony, the victim impermissibly attempted to enhance her credibility. *Id* at 297, 547 A.2d at 358. Therefore, the Court found the testimony to be inadmissible because "[d]eterminations of credibility . . . are exclusively the province of the jury. We have consistently rejected expert

testimony which encroaches on this vital jury question." *Id.* at 294, 519 A.2d at 357 (citation omitted).

Similarly, expert testimony that Defendant suffers from post-traumatic stress disorder because she was kidnaped and shot by her abductor serves to strengthen Defendant's credibility that the event actually occurred. Therefore, we precluded Ms. Morrell's expert testimony at trial.

II. Issues raised at trial

Defendant asserts that the Court also committed reversible errors during the trial. We have already addressed two of the issues raised by Defendant and therefore may summarily dispose of them. Defendant challenges the Court's refusal to permit expert testimony by Frank Friel and Lorrie Morrell at trial. With respect to Ms. Morrell's testimony, we believe that no further explanation is necessary regarding our decision to preclude her testimony.

With respect to Frank Friel's testimony, Defendant wished to present his opinion regarding the competency of the police investigatory techniques. Defendant submitted three totally inconsistent versions of the event of April 19, 1996 to the police. The most effective police investigation had to be predicated upon and rely upon Defendant's statements. However, in this case Defendant's version of the events of April 19, 1996 constantly changed and contained several internal inconsistencies. For this reason, expert testimony regarding how the police officers should have conducted the investigation more competently is not possible. Defendant urged that the work of the police, while well-meaning, was inadequate. This contention simply does not sponsor expert testimony in light of the unique circumstances in this case. Furthermore, such an action invites a contest of experts regarding the quality of the police work in all criminal trials. The Defendant was entitled to, and did, explore reasons why

the police conducted their investigation in the manner they did with virtually every police witness who testified. It becomes difficult to imagine which of Defendant's versions the expert would have testified should have sponsored a particular course of action.

Furthermore, we note that the principal, consistent and ultimate focus of alleged poor police work was the issue of failure of investigating officers to follow-up on a 4048 report of a blue van, which matched Defendant's description of the get-away vehicle, owned by a person by the last name of Rivera.[7] Ultimately, Defendant withdrew her quest for an explanation of that issue.

To the extent that an expert would testify regarding the custodial nature and the legality of various searches and seizures, obviously his testimony would have been inadmissible.

a. The Court properly allowed the testimony of Marie Bachmayer

Defendant contends that the Court improperly allowed the testimony of Marie Bachmayer regarding her relationship with Defendant's boyfriend, Sergeant Ginaldi. Defendant argues that the testimony is irrelevant and sensationalistic. We disagree.

The Court ruled that Ms. Bachmayer would be permitted to testify regarding her relationship with Sergeant Ginaldi following an offer of proof from the Commonwealth regarding what it expected Ms. Bachmayer's testimony to be. Specifically, Ms. Bachmayer revealed that she maintained a romantic relationship with Sergeant Ginaldi for

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[7]The last name of Janet Camacho's common-law husband is Rivera.

approximately two years prior to April 19, 1996. (R. at Vol. III, 284-85). Sergeant Ginaldi represented to Ms. Bachmayer that his relationship with Defendant was strictly one of friendship and that he stayed with Defendant because Defendant was ill. (R. at Vol. III, 285). Ms. Bachmayer and Sergeant Ginaldi argued frequently about his relationship with Defendant. (R. at Vol. IV, 38, 72). Ms. Bachmayer represented to the Commonwealth that on April 14, 1996, she gave Sergeant Ginaldi an ultimatum that he had to choose either Defendant or her. (R. at Vol. III, 285). Sergeant Ginaldi told Ms.Bachmayer that he was going to end the relationship with Defendant. (R. at Vol. IV, 38-39). Cellular phone records reveal that on the following day, April 15, 1996, a call was placed from Defendant's cellular phone to Ms. Bachmayer's residence.

We found Ms. Bachmayer's testimony relevant and therefore admissible as evidence of Defendant's motive to create a story that she had been shot by an abductor. Her testimony is also relevant as it helps to explain activity on Defendant's and Sergeant Ginaldi's cellular phones as reflected by the records for the period between April 14 and April 19, 1996. Furthermore, Ms. Bachmayer's testimony explains Defendant's conduct in the days following Ms. Bachmayer's ultimatum to Sergeant Ginaldi, culminating with the shooting in the early morning hours of April 19.

On April 16, 1996, Defendant called Janet Camacho at her home and asked if she could come over to Janet Camacho's house to speak with her. (R. at Vol. III, 228-29). Janet agreed. (R. at Vol. III, 229). On that same date, Defendant also paged Johanna Camacho. (R. at Vol. III, 251-52). Johanna Camacho called the number left on her pager and left a message with her home phone number. (R. at Vol. III, 252). When she returned home from work that day, there was a message on her answering machine from Defendant expressing Defendant's wish to get together and

talk. Prior to this date, neither of the Camacho sisters had seen or spoken with Defendant in about two years. (R. at Vol. III, 225, 229, 250).

Defendant arrived at Janet Camacho's house about twenty minutes after Defendant called. (R. at Vol. III, 231). In addition to Janet Camacho, Johanna Camacho and their Aunt Lucy were present when Defendant arrived. (R. at Vol. III, 232). When Defendant arrived at Janet Camacho's home, the first question she asked Janet Camacho was, "Is your brother getting out in June?" (R. at Vol. III, 232). Janet Camacho replied that he was not, that he was to be transferred to Gratersford Prison and that she did not know when he would be released. (R. at Vol. III, 232-33). During this meeting, the following conversation also took place:

> Q: Did you discuss with Kathryn a request that your brother had made in reference to Maria?
>
> A: Yeah. He told me that to find Maria, he wanted us to call Search USA or something. And I said, "They're not missing. She said she just doesn't want any contact with the family. So we can't force her to have contact with us."
>
> And then I went on to say, I said, "Every time I visit him when I used to go over at Camp Hill he used to tell me the P.O. Box Office where he'd write for her, for me to go and keep a look out and see if I see her and Maria. And I would tell him, why did he want me to do that. He said, if you see Maria, he would joke wound, if you see Maria, bring Maria and bring her to see me, take Maria and bring her to see me. I used to tell him, you must be crazy. What you want, me to go to jail with you? I would never do something like that."
>
> Q: Did you tell Kathy that?

A: I tell Kathy that and we all started laughing around the table.

R. at Vol. III, 234.

Janet told Defendant that she would like to see Maria. (R. at Vol. III, 239). Defendant pulled out a recent picture of Maria and gave it to Janet and Johanna Camacho. (R. at Vol. III, 239).[8]

As Defendant left Janet Camacho's home that evening, she pointed to the blue Blazer parked in front of the house and remarked, "Isn't that your father's Blazer?" (R. at Vol. III, 243). Janet Camacho replied that it was, that she had used it for a vacation and had not yet returned the vehicle to her father." [sic] (R. at Vol. III, 243).

Two days after this event, Defendant alleged that she was abducted and shot by a person sent by the Camacho family. Based on the foregoing, we found Ms. Bachmayer's testimony to be relevant. Her testimony provides both a motive for Defendant's behavior as well as an explanation for why she acted as she did following Marie Bachmayer's ultimatum to Sergeant Ginaldi.

b. The Court did not shift to Defendant the burden of proving that she was a victim of a crime

Defendant contends that the Court shifted to the Defendant the burden of proving that she was a victim of a crime. We find no merit in this allegation. The burden of proof always remained on the Commonwealth to prove beyond a reasonable doubt that Defendant had committed the

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[8]Janet brought a reprint of the picture with her to trial. The Camacho sisters sent the original that Defendant had given to them to Maria's father.

offenses with which she was charged.

c. The Court acted properly in imposing sentence

Defendant's final contention is that the "Court erred or abused its discretion in sentencing the Defendant in the aggravated range since the reasons identified by the Court at the sentencing proceeding relating to the Defendant's alleged attempt to incriminate other persons, are mere elements of the offense of False Reports to Police Authorities."

Again, we find Defendant's argument to be baseless. The sentence imposed by the Court is warranted by the nature, character and import of Defendant's false accusations that the Camacho family masterminded and executed an abduction and shooting.

Upon careful review of the record and Defendant's Statement of Issues to be Raised on Appeal, we believe that the foregoing addresses the issues raised by Defendant on appeal and explains our rulings with respect to those issues.

COMMONWEALTH OF, PENNSYLVANIA Appellee	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
V.	:	
KATHRYN HELLWIG, Appellant	:	No. 00191 EDA 1999

Appeal from the JUDGEMENT OF SENTENCE entered January 14, 1999 In the Court of Common Pleas of BUCKS County CRIMINAL No. 5253 - 98

BEFORE: McEWEN, CAVANAUGH, and EAKIN, JJ.
MEMORANDUM: FILED NOV 17 1999

Kathryn Hellwig appeals from the judgement of sentence following a jury determination of guilt of unsworn falsification to authorities and making false reports to law enforcement authorities. Appellant was sentenced to not less than three months and not more than twenty-three months imprisonment. We affirm.

In order to address the merits of this appeal, we review the background of this case. The facts as revealed at trial are as follows: appellant reported to police that she was the victim of the serious felony crimes of kidnaping and aggravated assault by firearm on April 19, 1998, at about two a.m. Appellant spoke to law enforcement officers on numerous occasions to assist in their efforts to apprehend the suspects. Among her oral and written statements and the physical evidence there were inconsistencies and contradictions. Only after a through [sic] investigation did law enforcement find there was no basis for her claims. This led to the filing of the present charges.

Appellant raises the following issues for our review:

I. Did the Trial Court err as a matter of law in failing to suppress all of the evidence which resulted from the Commonwealth's warrantless search of the Defendant's purse prior to the time that the Defendant became a suspect?

II. Did the Trial Court err as~a matter of law in failing to suppress all of the written and oral statements of the Defendant which were made without the Defendant having been advised of her Miranda rights?

III. Did the Trial Court abuse its discretion or err as a matter of law in precluding the proffered testimony of the Defendant's treating psychotherapist to negate the element of specific intent of the offenses charged?

IV. Did the Trial Court abuse its discretion or err as a matter of law in precluding the proffered testimony of the Defendant's police procedures expert?

In evaluating the issues on appeal it is important to give full recognition to the fact that the events which gave rise to the instant charges arose out of an investigation by authorities after appellant reported that she was the victim of serious crimes and that her interaction with the authorities was pursuant to their efforts to investigate the crimes and take appropriate actions. A victim of a crime should neither want nor expect the protections afforded a suspected perpetrator of a crime.

We find the exhaustive and well-reasoned opinion by the Honorable Edward G. Biester, Jr. adequately addresses the

issues and we adopt it as our own. We further consider the third and fourth issues raised and supplement the opinion of Judge Biester with our analysis of the propriety of excluding the defense expert witnesses.

The first issue concerns the exclusion of the proffered testimony of appellant's treating psychotherapist. Admission of expert testimony is within the discretion of the trial court and will not be reversed absent an abuse of discretion. *Commonwealth v. Bardo*, 551 Pa. 140, 153, 709 A.2d 871 (1998). An expert should be permitted to testify according to Pa.R.Evid. 702,[1] if "scientific, technical or other specialized knowledge beyond that possessed by a layperson will assist the trier of fact to understand the evidence or to determine a fact in issue . . .". However, any question of admissibility begins with a determination of the relevance and probative value of the evidence. *Commonwealth v Dunkle*, 529 Pa. 168, 177, 602 A.2d 830, 834 (1992). Therefore, although relevant, evidence may be excluded if its probative value is outweighed by the danger of. . . confusion of the issues, or misleading the jury . . .. Pa.R.Evid. 403. Also, expert testimony cannot be used to "intrude upon the jury's duty of determining credibility." *Commonwealth v. Simmons*, 541 Pa. 211, 230, 662 A.2d 621, 631 (1995).

Appellant asserts that this testimony would negate the element of specific intent of the charged crimes. She claims that Lone Morrell, her outpatient therapist, should have been permitted to testify that appellant was suffering from post-traumatic stress disorder (PTSD). However, Morrell did not make the diagnosis, and what she intended to testify to, was that assuming appellant had PTSD, this disorder would explain any memory loss or impairment and would make it difficult for her to remember details.

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[1]We note this trial began after October 1, 1998, therefore, the Pennsylvania Rules of Evidence apply.

Appellant argues that the testimony was admissible to show the inconsistencies in her statements were explainable because of PTSD. Expert testimony offered to explain a witness' omission of details, inability to recall dates and times, and the witness' behavior as a result of a particular traumatic event is inadmissible, since it improperly infringes upon the jury's right to determine credibility and because it is not beyond the knowledge or experience of the average juror. *See Dunkie, supra* (expert testimony concerning typical behavior patterns exhibited by sexually abused children and expert testimony to explain failure to recall or relate details or make a prompt complaint inadmissible); *Commonwealth v Gallagher*, 519 Pa. 291, 547 A.2d 355 (1988) (error to allow rape trauma syndrome expert to testify such trauma could prevent timely identification of assailant as unwarranted appearance of authority of credibility which is within ability of ordinary juror to assess). Moreover, there was no foundational evidence that appellant suffered from a stress disorder or was in fact suffering from a memory deficit.

In addition, this testimony would not serve to assist the fact finder but could lead to confusion of the issues and mislead the jury. Pa.R.Evid. 403. Appellant did not testify and this testimony would have served to impermissibly bolster the defense that appellant actually was a victim of crimes. The expert would have testified to appellant's version of the alleged event and how this affected her ability to remember and relate the event. This was an attempt to substitute the psychotherapist's testimony for that of appellant. It therefore would have usurped the jury's function.

The next issue we consider is whether the trial court abused its discretion in precluding the testimony of a "police procedures" expert. This expert would have testified about the police department's failure to follow police procedures, including not properly following up with certain evidence, as

well as the custodial nature of the interviews with appellant.

While proof that appellant was, in fact, the victim of a crime, would be relevant, this may not be proven by second guessing the police procedures involved as this would be wholly inconclusive. The proffered evidence concerning "police procedures" would serve therefore to introduce speculative and irrelevant issues into the case. The court did not err in the exclusion of this testimony.

Judgment of sentence affirmed.

Supreme Court, U.S.
FILED
OCT 2 - 2000
OFFICE OF THE CLERK

NO. 00 598

In The
Supreme Court of the United States

KATHRYN HELLWIG,
Petitioner

v.

PENNSYLVANIA,
Respondent

Supplemental Appendix to Petition for a Writ of Certiorari to the Pennsylvania Superior Court

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SUPPLEMENTAL APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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COMMONWEALTH OF, PENNSYLVANIA Appellee	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
V.	:	
KATHRYN HELLWIG, Appellant	:	No. 00191 EDA 1999

ORDER

AND NOW, this 21st day of January, 2000, IT IS HEREBY ORDERED:

THAT the application filed November 26, 1999, requesting reargument/reconsideration of the decision dated November 17, 1999 is DENIED.

PER CURIAM

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF, Respondent	:	No. 123 M.D. Alloc. Dkt. 2000
V.	:	**Petition for Allowance of Appeal from Order of the**
KATHRYN HELLWIG, Petitioner	:	**Superior Court**

ORDER

PER CURIAM

AND NOW, this 17th day of July, 200, the Petition for Allowance of Appeal is denied.

TRUE & CORRECT COPY

Attest: Jul 18, 2000

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SHIRLEY J. PHIPPS
APPELLATE CLERK

(3)

No. 00-598

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

KATHRYN HELLWIG,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF PENNSYLVANIA

BRIEF IN OPPOSITION

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The respondent respectfully request that this Honorable Court deny the Petition for Writ of Certiorari seeking review of the Superior Court of Pennsylvania's judgment dated November 17, 1999.

COUNTER-STATEMENT OF CASE

A. Procedural History

Petitioner was arrested on July 7, 1998 and charged with Unsworn Falsification of Authorities, 18 Pa. C.S.A. § 4904(a)(1), and False Reports to Law Enforcement Authorities, 18 Pa. C.S.A. § 4906(a). Pre-trial motions were litigated on January 8 and January 11, 1999. Following a trial by jury that began on January 11, 1999, petitioner was convicted of the aforementioned offenses on January 14, 1999. On that same date, petitioner was sentenced to a term of incarceration of not less than three (3) nor more than twenty-three (23) months. The Trial Court also ordered that petitioner receive a mental health examination and abide by any recommended treatment.

The Trial Court published its Opinion on March 2, 1999.

On November 17, 1999, the Pennsylvania Superior Court affirmed the judgment of sentence after a timely appeal by petitioner. The Superior Court in its Memorandum Opinion found the Opinion of Bucks County Common Pleas to be exhaustive and well-reasoned, and adopted the Opinion as its own in denying the claims that police illegally obtained statements or evidence from petitioner, the self-reported "victim" of violent crime. The Superior Court determined that the Trial Court had not erred in excluding any of the proposed defense testimony, as it could only serve to bring speculative and irrelevant issues into the case.

On January 21, 2000, a Court Order denying petitioner's request for rehearing was entered. On July 17, 2000, the Pennsylvania Supreme Court denied petitioner's Petition for Allowance of Appeal.

On October 2, 2000 the petitioner filed this Writ of Certiorari in the Supreme Court of the United States.

B. Factual History

On Sunday morning, April 19, 1998, shortly after 2:00 a.m., the Warminster Township Police were called to respond to assist a shooting victim at the parking lot of Yum Yum Donuts on York Road and County Line Road in Warminster Township, Bucks County, Pennsylvania. N.T. Vol. III, p. 85. When police arrived they found petitioner seated in the driver's seat of her car, a two-door Ford Bronco. She was suffering from a gunshot wound to her right thigh and being treated by an emergency medical technician. N.T. Vol. III, pp. 9-10, 86, 92. Petitioner was alert and calm. N.T. Vol. III, pp. 11, 22, 100. Present on scene was Sergeant Anthony Ginaldi of the Philadelphia Police Department. Sgt. Ginaldi was the live-in paramour of petitioner. Sgt. Ginaldi, armed and in uniform, had arrived in a marked Police unit from the Seventh District of Philadelphia prior to the arrival of the Warminster police. N.T. Vol. III, p. 86. Petitioner reported to the police immediately upon their arrival that she had been abducted and shot by a third party. Police immediately broadcast the information over police radio to Philadelphia, Bucks and Montgomery Counties and the surrounding area in an attempt to apprehend the individuals reportedly involved. The police also took steps to protect petitioner's father and daughter. N.T. Vol. III, pp. 13-20.

A handgun owned by petitioner was found on the passenger's seat of petitioner's vehicle. N.T. Vol. III, pp. 87-88. Ballistic evidence established that petitioner was shot with her own gun. N.T. Vol. III, pp. 152-53. The bullet was later removed from her right buttock at Abington Memorial Hospital. The bullet had entered her right thigh and, traveling front to back, lodged in her right buttock. N.T. pp. 119-20.

Both the Warminster and Philadelphia Police Departments began investigations to apprehend the reported shooter. During the course of the investigation petitioner supplied police with false, contradictory and irreconcilable accounts of the events surrounding this shooting of April 19, 1998. Moreover, the investigation into the shooting revealed other evidence that contradicted and belied petitioner's various versions of events.

When first interviewed in the Yum Yum Donuts parking lot, petitioner told police that she was abducted approximately a block away from her home in Philadelphia. She stated that she had stopped and gotten out of her car to use the walk-up MAC machine at the Police & Fire Credit Union at Grant Avenue and Academy Road in Philadelphia. She stated that when she got back into the car, there was a man in the back seat who told her to take him to her daughter and then told her to take him to petitioner's father. Petitioner told police that she drove around trying to stall but ultimately decided to pull into the parking lot of the Rosemore Shopping Center located on County Line Road in Warminster Township, Bucks County. She told police that she decided to pull out her own gun and shoot him before he could shoot her. She stated that she pulled the gun from her left waste band with her left hand. The man in the back seat

began to struggle for possession of the gun from the back seat. He took the gun from her and shot her before fleeing her car through the front passenger seat car. Petitioner stated that he then jumped into another car and fled the scene. Petitioner could not explain where this vehicle came from but insisted that she was sure that she had not been followed during the almost two hours she drove around with her abductor. Petitioner told police that she did not see nor have any indication that the man was armed, but only had a "feeling" that he was armed. Petitioner insisted that she never saw the man and could not describe him. She also insisted that she could not provide any description of the vehicle to which the subject fled. Petitioner for the first time implicated the Camacho family and told police that her daughter's father, Carmello Camacho, was in prison and that his family was trying to take her daughter. N.T. Vol. III, pp. 92-99.

Immediately following the shooting, the police processed the crime scene and seized the victim's vehicle, weapon, and clothing as forensic evidence, to identify the perpetrator and establish the crime. Subsequent investigation revealed evidence inconsistent with petitioner's account. The MAC machine at the Police and Fire Credit Union described by petitioner was not a walk-up machine but rather a drive-up machine. The video tape retrieved from the credit union showed that petitioner drove up to use the machine and drove away without any indication of any trouble or any indication that anyone else was in her vehicle. N.T. Vol. IV, pp. 89-91; Exhibit C-21. Inspection of the gun revealed that the cylinder of the revolver had been moved indicating that someone had opened the weapon. N.T. Vol. III, pp. 138-40. Inside of petitioner's coat pocket investigator's found a MAC receipt for the police and fire Credit Union dated April 18, 1998. That receipt indicated that petitioner withdrew $100

at 11:44 p.m. Neatly wrapped around that card were four (4) twenty-dollar bills and five one (1) dollar bills. N.T. Vol. III, pp. 143-44. The remaining fifteen (15) dollars was never found nor accounted for by petitioner.

Petitioner was again interviewed at 5:30 a.m. at Abington Memorial Hospital. N.T. Vol. III, pp. 134-35. At that time, petitioner told police that she had seen her abductor in the rear view mirror. She stated that he wore a ski mask. N.T. Vol. III, p. 137. She told police that she knew he wanted to shoot her with her own gun despite the fact that the man did not know that she had a gun. N.T. Vol. III, p. 138.

Following her release from the hospital, police again interviewed petitioner at the Warminster Township Police Department on May 1, 1998. N.T. Vol. III, pp. 22-23. Petitioner was left alone in a conference room for two (2) hours to write out a hand-written statement relating all the events of the abduction and shooting in detail. N.T. Vol. III, p. 25; Exhibit C-4. In that statement, petitioner related that the events that led to the shooting began on April 15, 1998 when she received a voice mail message from Johanna Camacho, the sister of Carmello Camacho, the father of petitioner's five year old daughter, Maria. Petitioner related that she received a second voice mail message on the date of the shooting, April 18, 1999 from the same Johanna Camacho. Petitioner claimed that she tried to return that call several times and ultimately reached Janet Camacho, Johanna's sister who promptly threatened to take Maria away from petitioner. The Camacho sisters live in Philadelphia next door to each other. N.T. Vol. III, pp. 30-36.

In this written account of May 1st, petitioner related the same account of the incident as to the locations of the abduction and shooting. However, additional critical events

changed from her previous accounts. In this account, petitioner related that she never got out of her car. She related that she drove up to the MAC machine and noticed the abductor as she drove away. She claimed that the abductor pulled a gun and held it to her arm. For the first time, petitioner claimed that the abductor repeatedly threatened to shoot her. Petitioner, who up until that point had told police that she had decided to pull into the shopping center parking lot to end the incident, changed her account and told police that the abductor ordered her to pull into that lot. In this account, petitioner claimed that despite her alleged fear and nervousness, she laughed at and mocked the abductor when he learned that for two hours she had been driving around to stall him. She claimed she laughingly told her abductor "Wow. You finally figured it out." In this account, petitioner claimed that she and the abductor fought for the gun while the abductor was in the front passenger seat, not the back seat as she had previously told police. Finally, petitioner, despite her inability on April 19th to describe the "getaway" car or her assailant, now gave a detailed description of both the assailant and the vehicle. N.T. Vol. IV, p. 96. Petitioner described a 1987-1989 dark blue Chevy Blazer and provided such minute details such a description of the wheel cover and the louvers over the windows. Petitioner claimed that despite her fear and nervousness, she chased this armed gunman and his unknown accomplice out of the parking lot driving 80 m.p.h. N.T. Vol. III, pp. 37-53.

Petitioner was interviewed by police about the contents of this hand-written statement. N.T. Vol. III, p. 270. Petitioner told police that on Thursday, April 16th, she received a voice mail message from Johanna Camacho, that she tried to call back but did not speak to her. She said she was home all night and didn't call again until the

next day, the 17th, in complete contradiction to the testimony of the Camacho sisters. N.T. Vol. III, pp. 271-72. Moreover, the telephone records for the 16th revealed that petitioner initiated the telephone contact with the Camachos and that petitioner did not receive any calls or messages from them. N.T. Vol. III, p. 276. The records also contradicted petitioner's claim that she was home all night and supported the Camachos' account that petitioner visited them at their residence around 7:30 and stayed for approximately forty (40) minutes. Petitioner could not explain the inconsistency. N.T. Vol. III, p. 281. She could not explain why she was trying to contact the Camachos. N.T. Vol. III, p. 282. Petitioner had told police that she had received a voice mail message from the Camachos on Thursday the 16th but did not return that call until Friday morning the 17th. N.T. Vol. IV, pp.92-4. Petitioner's telephone records revealed that no such call was made. Petitioner could not explain this inconsistency. N.T. Vol. IV, p. 100. Petitioner had told police that she used the MAC at Grant and Academy and not the one at work because she needed an account balance. N.T. Vol. III, p. 48, Vol. IV, pp. 94-95. Investigators checked the MAC machine at petitioner's place of employment and learned that that machine also gives an account balance. N.T. Vol. IV, pp. 21-22. Petitioner could not explain the possession by the Camachos of a recent school photograph of her daughter Maria. N.T. Vol. IV, p. 98. She could not explain the disappearance of money from her $100 MAC withdraw. N.T. Vol. IV, pp. 99-100. The telephone records also established that at 1:44 and 1:45 a.m. petitioner checked her voice mail. This occurred before she received Sgt. Ginaldi's call which, according to petitioner's account of events, would have been during the course of the abduction. Petitioner had initially told police that she never touched the cellular telephone in her car.

Petitioner could not explain why the telephone records reflected that she checked her voice mail twice during the abduction. N.T. Vol. IV, pp. 103-04. At the conclusion of this interview, police informed petitioner that they did not believe she was telling them the truth and that they wanted to hear the truth. N.T. Vol. IV, p. 128.

The day after this interview, May 2nd, petitioner called the Warminster Police Department and left a voice mail message wherein she apologized to Detective Mosiniak for the previous night and stated that she wanted to make things right and that she realized the detectives were only trying to help her. N.T. Vol. IV, pp. 105-07; Exhibit C-22. On May 4th, petitioner again called the police department. She told one of the investigating detectives that she was sorry about the May 1st interview. She stated that she wanted to make things right and asked to talk to the investigators again. N.T. Vol. IV, p. 108.

On May 6, 1998, petitioner again came to the Warminster Township Police Department and voluntarily gave a second hand-written statement recounting the alleged events of April 18th and 19th. N.T. Vol. IV, p. 109; Exhibit C-23. In that statement, petitioner completely changed her account of where and how the alleged abduction began, the number of individuals and vehicles involved, and how she was shot. In this new account, petitioner changed her account of her contact with the Camacho family in an attempt to conform her story to the telephone records. She now stated that she called the Camachos on Thursday night from her cell phone. She claimed that her call to them on Friday was from a telephone booth and not her cell phone. As to the alleged abduction, petitioner wrote that she went to the MAC machine, checked her voice mail and retrieved a message from Janet Camacho telling her to meet her "now" at a

parking lot at the Neshaminy Mall in Bensalem Township, Bucks County. Petitioner's telephone records revealed that petitioner did not in fact check her voice mail at that time. Petitioner related that she drove to that parking lot. While there, a black Pathfinder pulled up beside her and an unmasked Hispanic male got into the passenger seat of her car. He ordered her to drive telling her that they were going to meet Janet and Johanna. Petitioner related that the Pathfinder disappeared and that she drove around, at one point stopping at the Wal-Mart parking lot in Warminster Township. She related that this Hispanic male told her to pull into the parking lot at Rosemore Shopping Center and that he appeared to be frustrated. In an apparent attempt to explain why her telephone records would show that she checked her voice during the abduction, petitioner claimed that she then suggested to her abductor that she check her voice mail to see if Janet or Johanna had called. She further related that after she checked her voice mail, a second man, wearing a mask and gloves got into the passenger seat of her car. She claimed that the first unmasked man then got into the back seat of her car and held a gun to her arm. The masked man told her to drive. She refused and pulled out her gun. She then claimed that the gun was taken from her by the masked man in the passenger seat who stated "this one's from us," and shot her. She claimed both men then fled the vehicle into an awaiting blue Blazer. N.T. Vol. IV, pp. 133-42. Once again, police told petitioner that they had problems with her account. Petitioner responded to police that "that's my story. . . ." N.T. Vol. IV, p. 145.

Testimony at trial revealed that petitioner told her sister and her sister's boyfriend, a Philadelphia police officer, her first version of events, that she was abducted out of Philadelphia, but never told them this different and revised version of events. N.T. Vol. IV, pp. 187-88, 199.

Other evidence introduced at trial also established that petitioner's accounts were fabricated. Investigators inspected petitioner's vehicle and observed that a number of items that were on the front passenger seat floor were still neatly folded and undisturbed despite petitioner's claim that a her reported abductor occupied that seat during the struggle for the gun. N.T. Vol. III, pp. 164-5; Exhibit C-9. Despite the two-hour drive described by petitioner, an inspection of the gas tank revealed almost a full tank of gas. N.T. Vol. III, pp. 167; Exhibit C-10. Despite petitioner's claim that her abductor struggled with her from both the back seat and the front seat, the layer of dust along the interior of the car was undisturbed. N.T. Vol. III, pp. 168-69; Exhibit C-12. N.T. Vol. III, pp. 170-71. The vehicle was examined for fingerprints. N.T. Vol. III, p. 171. No fingerprints of a third person were found, only those of petitioner and Sgt. Ginaldi. N.T. Vol. III, pp. 185-86.

A blue Blazer identical to the description given by petitioner was located by Philadelphia police detectives and belonged to the Camacho family. It was located parked in front of their residence on Ella Street in Philadelphia. Petitioner identified the Camacho's vehicle as the vehicle that was used to assist the abductor to flee from the shooting. N.T. Vol. III, pp. 188-89, 192; Vol. IV p. 96. Both Janet and Johanna Camacho cooperated with police in this investigation. They told the police that the Blazer was inoperable and had not been moved for eight months. Based on this information, the Detectives examined the car and observed debris in and around the vehicle confirming the information given by the Camachos. Police also attempted to start the car but were not able to do so. N.T. Vol. III, pp. 190-91. After obtaining a search warrant,

police seized and later examined the Blazer. That examination revealed that the Blazer had not been operated for an extended period of time. That conclusion was reached based on the amount and location of debris in the engine and on the tires and rust on the motor parts. N.T. Vol. III, 188-89, 204-13; Exhibit C-15. The Camacho sisters also provided police with a photograph of Maria that they claimed petitioner had given to them the week of the shooting. N.T. Vol. III, pp. 201-02.

Both Janet and Johanna Camacho testified at trial. Janet works for an insurance company in King of Prussia. N.T. Vol. III, p. 219. Johanna works as a nurse at Albert Einstein Medical Center. N.T. Vol. III, p. 250. Both women testified that petitioner, whom they had not seen for years, suddenly contacted them and asked to visit. Petitioner appeared at their residence on Thursday April 16th. N.T. Vol. III, pp. 229, 251-2. Petitioner stayed for a short visit and left. Before leaving petitioner gave the sisters a picture of Maria. She also observed and commented on the Blue Blazer parked in front of the residence. N.T. Vol. III, pp. 239-41, 243, 254, 256-57. That visit was witnessed by Janet and Johanna Camacho's aunt. N.T. Vol. IV, pp. 87-88.

Petitioner's motive for this obviously self-inflicted gunshot wound became clear during the testimony of Marie Bachmayer. Ms. Bachmayer, a police dispatcher, testified that she had an ongoing romantic relationship with petitioner's boyfriend, Sgt. Anthony Ginaldi, for two (2) years prior to the shooting. N.T. Vol. IV, p. 37. She testified that on Tuesday, April 14th, five (5) days before the shooting and two (2) days before petitioner's unexpected appearance at the Camacho residence, she gave Ginaldi an ultimatum.

She told him she could no longer tolerate Ginaldi's relationship with petitioner. Ginaldi told Bachmayer that he would tell petitioner he wanted to move on to a new relationship. N.T. Vol. IV, pp. 38-39. On April 15th, petitioner called Bachmayer's residence from her cell phone. That call lasted eleven minutes. N.T. Vol. IV, pp. 76-79; Exhibit C-19. Moreover, on both Friday night, April 17th, and Saturday night, April 18th, petitioner made false reports of a prowler at her residence in an apparent attempt to gain Ginaldi's attention. N.T. Vol. III, pp. 36-38, 78-82.

REASONS FOR DENYING THE WRIT

THE TRIAL COURT PROPERLY REFUSED TO SUPPRESS THE PHYSICAL EVIDENCE TAKEN FROM PETITIONER'S PERSON AND VEHICLE AS PETITIONER, A SELF-REPORTED "VICTIM" OF A VIOLENT CRIME, HAD NO REASONABLE EXPECTATION OF PRIVACY, THE EVIDENCE WAS IN PLAIN VIEW, THE EVIDENCE WAS SEIZED PURSUANT TO PETITIONER'S CONSENT, AND/OR THE EVIDENCE WAS SEIZED PURSUANT TO A VALID INVENTORY SEARCH.

The Trial Court properly ruled that all of the physical evidence was properly seized by police without a warrant. Petitioner had no reasonable expectation of privacy in the evidence, the evidence was in plain view, the evidence was seized by consent, and/or the evidence was seized pursuant to a valid inventory search.

For purposes of the Fourth Amendment, a "search" is an examination of an individual's house, buildings or person for the purpose of discovering contraband or

some evidence of guilt to be used in the prosecution of a criminal action. Such an examination must compromise an individual's legitimate privacy interest before it constitutes a search. *Horton v. California*, 496 U.S. 128, 133, 110 S. Ct. 2301, 2306, 110 L. Ed. 2d 112 (1990). Both the Pennsylvania and United States Constitutions do not prohibit warrantless searches but rather protect individuals from "unreasonable searches and seizures." *Illinois v. Rodriguez*, 497 U.S. 177, 183-184, 110 S. Ct. 2793, 2799, 111 L. Ed. 2d 148 (1990); *United States v. Hensley*, 469 U.S. 221, 226, 105 S. Ct. 675, 679, 83 L. Ed. 2d 604 (1985). Individuals are protected from "unreasonable" governmental intrusions into their legitimate expectations of privacy. To prevail, petitioner is required to first show that a subjective expectation of privacy exists to the area being searched. An expectation of privacy exists where a defendant by his conduct "exhibits an actual (subjective) expectation of privacy" and that the subjective expectation "is one that society is prepared to recognize as reasonable. *Minnesota v. Olson*, 495 U.S. 89, 95-96, 110 S. Ct. 1684, 1687, 109 L. Ed. 2d 85 (1990). The determination of whether an individual's subjective expectation of privacy will be recognized as legitimate depends upon the totality of the circumstances and ultimately rests upon a balancing of the societal interests involved. In order to have a reasonable expectation of privacy, one must intend to exclude another and must exhibit that intent. *Rakas v. Illinois*, 439 U.S. 128, 143-144, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978).

Consent also vitiates the need for a warrant. It is well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent. *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S. Ct. 2041, 2043-2044, 36 L. Ed. 2d 854 (1973).

The law also recognizes the concept of implied consent. In *Thompson v. Louisiana*, 469 U.S. 18, 105 S. Ct. 409, 83 L. Ed. 2d 246 (1984), this Honorable Court stated that the police may make warrantless entries on premises where they reasonably believe that a person within is in need of immediate aid, and that they may make a prompt warrantless search of the area to see if there are other victims or if a killer is still on the premises. *Id.*, at 21, 105 S. Ct. at 411. In, *Commonwealth v. Witman*, 750 A.2d 327 (Pa. Super. 2000), the Superior Court of Pennsylvania held that an exception to the warrant requirement exists where the defendant has summoned the police for help and thus set the tone for the initial investigation. *Id.* at 334-335.

Moreover, police may seize evidence without a warrant which is in plain view. Evidence may be seized which is in plain view if (1) the initial intrusion is lawful, (2) the evidence is inadvertently observed, and (3) there is probable cause to link the evidence to a criminal act. Probable cause exists if a reasonable man would believe that the item might be useful as evidence of a crime. *Minnesota v. Dickerson*, 508 U.S. 366, 374-375, 113 S. Ct. 2130, 2136-2137, 124 L. Ed. 2d 334 (1993).

Petitioner baldly claims that in the instant case, she was the target and focus of the police investigation, and that, therefore, the police were required to get a search warrant before securing any evidence of the reported crime. Petitioner's claim disregards the facts of this case.

In the instant case, petitioner reported to law enforcement authorities she was the victim of an abduction and shooting. The police responded appropriately in investigating and attempting to apprehend the reported suspects as reported by petitioner.

On April 19, 1998, shortly after 2:00 a.m., the Warminster Township Police, Bucks County, Pennsylvania responded to assist the call of a shooting victim in the parking lot of a donut store and found petitioner seated inside of her vehicle, a two-door Bronco, with a gunshot wound to her right thigh. Also present on the scene was petitioner's live-in paramour, a Philadelphia police officer who was armed and in uniform. Petitioner reported to the police immediately upon their arrival, while she sat in her vehicle being treated by an EMT, that she had been the victim of a crime — specifically that she had been abducted and shot while inside her vehicle. In response to her report of having been abducted and shot, as well as her condition upon police arrival, both the Warminster and Philadelphia Police Departments began investigations to apprehend the reported shooter. On scene, the police immediately broadcast the information over police radio to the surrounding counties in an attempt to apprehend the individuals reportedly involved. Moreover, the police took steps to protect petitioner's father and daughter. Police also began to secure evidence of the violent crime which petitioner reported.

While on scene, petitioner's gun was seized from the front passenger seat of her vehicle in plain view at the scene. N T. 1/8/99, In fact, petitioner's Bronco was the "crime scene." It was immediately secured and later removed and searched. N.T. 1/8/99, pp. 87-90. The police took custody of petitioner's clothing that was cut off of her in the ambulance. N.T. 1/8/99, 44-45. They took custody of her jacket at the hospital. All of this was done in petitioner's presence without objection. N.T. 1/8/99, pp. 24, 44-45. At the hospital, petitioner was told that her car, the contents of the car and her personal property on her person had been

seized as evidence and would be returned at a later date. Petitioner agreed with police department's handling of her property. N.T. 1/8/99, p. 110.

Petitioner's clothing which contained a bullet hole and blood splatters was also evidence properly seized in plain view. The jacket was properly inventoried. Once the change purse in the pocket of petitioner's jacket was opened to inventory its contents, the MAC receipt and money was clearly evidence of the crime reported by petitioner who claimed the abduction started after she withdrew $100 from the MAC machine.

Contrary to the above, petitioner bases her conclusions and her entire argument — that petitioner was the target and focus of the investigation — solely on the testimony of Sgt. Anthony Ginaldi. Ginaldi was petitioner's live-in paramour, who testified, in what petitioner's characterizes as an "abusive interrogation," that the first officer on the scene was screaming at petitioner and calling her a liar. Petitioner ignores the fact that the testimony of Ginaldi was specifically rejected by the Suppression Court. The Court found that the officer did not scream at petitioner nor did he call her a liar while on scene. In fact, the finding of the Trial Court was that the officer's focus at the scene was to acquire as much information as quickly as possible from petitioner who appeared to be a victim of a shooting and abduction where it appeared that the perpetrator was still at large. Vol. II p. 146

Additionally, based upon the information supplied by petitioner, it became immediately apparent to police that the cellular telephone records would be important evidence in the claimed abduction and shooting. Petitioner had told police

that the cellular telephone had been used to receive threatening calls during the week prior to the incident and been used during the alleged abduction itself. Sgt. Ginaldi was the subscriber and agreed to provide those telephone records. N.T. 1/8/99 pp. 111-14. Later Sgt. Ginaldi informed police that he was having difficulty getting the records and agreed to having the detective obtain the records. Those records were ultimately obtained through federal sources who had opened a federal case as a result of the kidnapping/abduction report. N.T. 1/8/99, pp. 115-17. Police later obtained the same records in response to a written consent form executed by Sgt. Ginaldi which covered not only the week of the incident, which were obtained by the federal authorities, but several months prior to the incident. N.T. 1/8/99 pp. 119-25; CS-1, CS-2.

The Trial Court properly refused to suppress these telephone records. Warrantless searches may be made with the consent of a third party with common authority over property. Where there is joint access or control, there is no legitimate expectation of privacy. *Illinois v. Rodriguez*, 497 U.S. 177, 181, 110 S. Ct. 2793, 2797, 111 L. Ed. 2d 148 (1990). Since the police had obtained the voluntary consent of Sgt. Ginaldi, the telephone subscriber, on two separate occasions, no warrant was required for the police to obtain those telephone records. Moreover, evidence which is initially illegally obtained but later legally obtained will not be suppressed. *United States v. Herrold*, 962 F.2d 1131 (1992).

Philadelphia Detective Bridgett Durso retrieved the MAC machine videotape with the consent of the Police and Fire Credit Union. N.T. 118-19. Petitioner had no reasonable expectation of privacy in the videotape of the Police and Fire Credit Union.

Despite all of the above, petitioner continues to maintain that the seizure of the physical evidence by the police in this case was illegal. Petitioner mistakenly relies on the case of *Flippo v. West Virginia*, 120 S. Ct. 7 (1999) wherein this Honorable Court, in a Per Curiam Opinion, reversed the trial court, ruling that the search of the homicide scene was impermissible on the sole ground that the residence was a "homicide crime scene." This Honorable Court specifically noted that the trial court did not rule on the inventory, plain view, or consent exceptions to the warrant requirement, but relied solely on the "crime scene exception." In reversing the trial court, this Honorable Court reiterated the holding of *Mincey v. Arizona*, 437 U.S. 385, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978), which stated that there is no "crime scene" exception to the warrant requirement. This Honorable Court specifically noted that it was not deciding whether the search in that case might be justified as consensual or justified under another of the established exceptions to the warrant rule or if it constituted harmless error. This Honorable Court therefore remanded the case for the state court to resolve these issues.

In contrast to *Flippo* and *Mincey*, the record in this case establishes the seizure of the items in question was pursuant to consent, plain view, inventory search, and/or petitioner's lack of reasonable expectation of privacy due to her self-reported position as a "victim" of a crime, all permissible under established Fourth Amendment standards.

The Fourth Amendment protects individuals against unreasonable searches and seizures. Petitioner approached the police and asked them to investigate a violent crime which she claimed had been committed against her. She reported that an armed gunman had discharged a gun in a public

parking lot and that that same gunman and his accomplices were at large and intent on kidnapping her child. Such conduct is tantamount to consent. *See Commonwealth v. Witman, supra*. Petitioner could have no actual (subjective) expectation of privacy given her implication of others in serious felonious conduct. Such an expectation of privacy cannot be considered as one that society is prepared to recognize as reasonable under circumstance where an individual characterizes themselves as a "victim", requests police assistance and thereby initiates a massive investigation under emergency circumstances. Moreover, petitioner specifically consented to the seizure of her property.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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